Supreme Court, U.S.
FILED
APR 24 2009
OFFICE OF THE CLERK

No. 081321

In The
Supreme Court of the United States

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

v.

ANTHONY ROMEO,

Respondent.

On Petition For Writ Of Certiorari To The New York State Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

STEVEN A. HOVANI*
Of Counsel to
THOMAS J. SPOTA
DISTRICT ATTORNEY OF
SUFFOLK COUNTY
Criminal Courts Building
200 Center Drive
Riverhead, New York 11901
(631) 852-2463

**Counsel of Record for Petitioner*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. For multijurisdictional offenders in federal custody on an international warrant, do state and local prosecuting agencies without actual custody have a duty not to defer to a foreign prosecuting agency under the Sixth Amendment right to a speedy trial?

2. Should the exercise of due diligence require a formal request for international extradition when Canadian officials would have to commute their sentence for the murder of a law enforcement official to comply?

3. Once the extradition treaty with Canada was amended to allow for the return of sentenced prisoners, did the guilty plea to manslaughter violate the Sixth Amendment right to a speedy trial?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	3
Reasons Why The Petition Should Be Granted	15
I. THE NEW YORK STATE COURT OF APPEALS FAILED TO GIVE PROPER WEIGHT TO RESPONDENT'S PROPORTIONATE RESPONSIBILITY FOR THE DELAY	15
a. Uncommon length of delay triggers inquiry but by itself does not justify dismissal as a matter of law	21
b. Reason for delay involves more than simple causation analysis and this Court requires blame for delay to be apportioned between the defendant and the government, particularly when, as here, respondent was a multi-jurisdictional offender and international fugitive	22

TABLE OF CONTENTS – Continued

Page

c. Respondent's re-entry into the United States did not require New York to prosecute first and there should be no "duty not to defer" when prosecuting agencies resolve who will be the first to prosecute a multijurisdictional offender 26

d. Due diligence does not require a futile request for extradition and there should be no duty to request the commutation of a Canadian sentence for murder in the first degree 28

e. Reasonableness of the government's explanation for delay was a proper basis to deny the 1999 motion to dismiss and respondent's conviction was not reversible as a matter of law 31

Conclusion 37

Appendix

Opinion of New York State Court of Appeals 1a

Opinion of Appellate Division, Second Department 12a

Decision of County Court of Suffolk County 19a

Treaty on Extradition between the United States and Canada

Original Treaty 24a

First Protocol 44a

Second Protocol 50a

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Barker v. Wingo, 407 U.S. 515 (1972) 15, 18, 21, 22, 24, 33, 34

Beavers v. Haubert, 198 U.S. 77 (1905) 17

Castro v. Ward, 138 F.3d 810 (CA 10), cert. denied sub nom. Castro v. Gibson, 525 U.S. 971 (1998) 19, 33

Conroy v. Leone, 2009 WL 597582 (CA 3 2002) 22

Cowart v. Hargett, 16 F.3d 642 (CA 5), cert. denied, 513 U.S. 886 (1994) 19

Delo v. Lashley, 507 U.S. 272 (1993) 35

Doggett v. United States, 509 U.S. 647 (1992) 15, 18, 21, 22, 33

Elcock v. Henderson, 28 F.3d 276 (CA 2), cert. denied sub nom. Elcock v. Walker, 513 U.S. 977 (1994) 21

Elcock v. Henderson, 947 F.2d 1004 (CA 2 1991) 22

Goodrum v. Quarterman, 547 F.3d 249 (CA 5 2008), cert. denied, ___ S.Ct. ___, 2009 WL 735703 (U.S.) 18, 23

Gray v. King, 724 F.2d 1199 (CA 5), cert. denied, 469 U.S. 980 (1984) 34

Hakeem v. Beyer, 990 F.2d 750 (CA 3 1993) 23, 34

Heiser v. Ryan, 15 F.3d 299 (CA 3), cert. denied sub nom. Heiser v. Stepanik, 513 U.S. 926 (1994) 20

TABLE OF AUTHORITIES – Continued

Page

Herrera v. Collins, 506 U.S. 390 (1993) 35

Jhirad v. Ferrandina, 536 F.2d 478 (CA 2), cert. denied, 429 U.S. 833 (1976) 28

Martin v. Warden, Atlanta Pen., 993 F.2d 824 (CA 11 1993) 17, 26

Mironescu v. Costner, 480 F.3d 664 (CA 4 2007), cert. denied, ___ U.S. ___, 128 S.Ct. 976 (2008) 28

Montalvo v. United States, 862 F.2d 425 (CA 2 1988) 29

Neely v. Henkel, 180 U.S. 109 (1901) 28

New York v. Hill, 528 U.S. 110 (2000) 34

Oregon v. Gozek, 546 U.S. 517 (2006) 16

Rashad v. Walsh, 300 F.3d 27 (CA 1 2002), cert. denied, 537 U.S. 1236 (2003) 19, 21, 23

Sabatier v. Dabrowski, 586 F.2d 866 (CA 1 1978) 28

Smith v. Hooey, 393 U.S. 374 (1969) 33

Tavarez v. United States Atty. Gen., 668 F.2d 805 (CA 5 1982) 26

United States v. Arceo, 535 F.3d 679 (CA 7 2008) 21

United States v. Bass, 460 F.3d 830 (CA 6 2006), cert. denied, ___ U.S. ___, 127 S.Ct. 2959 (2007) 18

TABLE OF AUTHORITIES – Continued

Page

United States v. Blanco, 861 F.2d 773 (CA 2 1988), cert. denied, 489 U.S. 1019 (1989) 29

United States v. Brown, 498 F.3d 523 (CA 6 2007), cert. denied, ___ U.S. ___, 128 S.Ct. 674 (2007) 18, 24, 33

United States v. Caldwell, 8 Blatchf. 131, 25 F. Cas. 237 (C.C.S.D.N.Y. 1871).....25

United States v. Corona-Verbera, 509 F.3d 1105 (CA 9 2007), cert. denied, ___ U.S. ___, 129 S.Ct. 149 (2007).....18, 29

United States v. Diacolios, 837 F.2d 79 (CA 2 1988) 29

United States v. Fei, 57 Fed. Appx. 879 (CA 2 2002), cert. denied sub nom. Zhang Ai Ping v. United States, 539 U.S. 936 (2003) 23

United States v. Fuller, 2009 WL 22886 (CA 7 (Ill.)) 18

United States v. Hall, 551 F.3d 257 (CA 4 2009) .26, 34

United States v. Hooker, 607 F.2d 286 (CA 9 1979) 30

United States v. Jackson, 549 F.3d 963 (CA 5 2008) 21

United States v. Loud Hawk, 474 U.S. 302 (1986) 22, 33

United States v. McGhee, 532 F.3d 733 (CA 8 2008) 34

TABLE OF AUTHORITIES – Continued

Page

United States v. Mendoza, 530 F.3d 758 (CA 9 2008) 20, 31

United States v. Munoz-Franco, 487 F.3d 25 (CA 1), cert. denied, ___ U.S. ___, 128 S.Ct. 678 (2007) 32

United States v. Ocampo, 266 Fed. Appx. 63 (CA 2 2008) 29

United States v. Pomeroy, 822 F.2d 718 (CA 8 1987) 31

United States v. Ramos, 264 Fed. Appx. 57 (CA 2 (N.Y.)), cert. denied, ___ U.S. ___, 128 S.Ct. 2925 (2008) 18

United States v. Rauscher, 119 U.S. 408 (1886) 25

United States v. Redd, 2009 WL 348831 (CA 5 (Miss.)) 33

United States v. Reumayr, 530 F.Supp.2d 1200 (D.N.M. 2007) 17

United States v. Rogers, 94 F.3d 657 (CA 10 1996) 21

United States v. Salzmann, 548 F.2d 395 (CA 2 1976) 31

United States v. Walton, 814 F.2d 376 (CA 7 1987) 31

United States v. Wanigasinghe, 545 F.3d 595 (CA 7 2008), cert. denied, ___ U.S. ___, 2009 WL 289717 (U.S.) 24

TABLE OF AUTHORITIES – Continued

Page

United States v. Williams, 372 F.3d 96 (CA 2 2004) 32

United States v. Williams, 557 F.3d 943 (CA 8 2009) 18

Vermont v. Brillon, 556 U.S. ___, 129 S.Ct. 1283 (2009) 15, 18

Williams v. Bartow, 481 F.3d 492 (CA 7 2007) 18

Wood v. Vasbinder, 2009 WL 383681 (CA 6 (Mich.)) 24

Yapp v. Reno, 26 F.3d 1562 (CA 11 1994) 26, 27

STATE CASES

Gilmore v. State, 655 N.E.2d 1225 (Ind. 1995) 20

Green v. State, 295 Ga. App. 468, 672 S.E.2d 414 (2008) 19, 32

Murphy v. State, ___ S.W.3d ___, 2009 WL 279513 (Tex. App. – Fort Worth) 19, 34

People v. Blakely, 34 N.Y.2d 311 (1974) 35

People v. Crane, 195 Ill. 2d 42, 743 N.E.2d 555, 252 Ill. Dec. 687 (2001) 19

People v. Donaldson, 103 Mich. App. 42, 302 N.W.2d 592 (1981) 31

People v. Lopez, 6 N.Y.3d 248 (2006) 34

People v. Mackle, 241 Mich. App. 583, 617 N.W.2d 339, app. denied, 620 N.W.2d 856 (2000) 31

TABLE OF AUTHORITIES – Continued

Page

People v. Perez, 229 Cal. App. 3d 301, 379 Cal. Rptr. 915 (2 Dist. Ca. 1991) 31

People v. Prosser, 309 N.Y. 353 (1955) 35

People v. Romeo, 12 N.Y.3d 51 (2009) 1

People v. Romeo, 47 A.D.3d 954, 849 N.Y.S.2d 666 (2d Dept. 2008) 1

People v. Taranovich, 37 N.Y.2d 442 (1975) 16

People v. Torres, 289 Ill. App. 3d 513, 682 N.E.2d 261, 224 Ill. Dec. 700 (1997) 19

State v. Bleau, 668 A.2d 642 (R.I. 1995) 24

State v. Griffin, ___ N.W.2d ___, 2009 WL 304455 (Minn. App.) 19

State v. Monson, 84 Wash. App. 703, 929 P.2d 1186 (Div. 3), review denied, 946 P.2d 403 (1997) 19

State v. Oliveira, 961 A.2d 299 (R.I. 2008) 19, 24

State v. Stow, 136 N.H. 598, 620 A.2d 1023 (1993) 20

CONSTITUTIONS

U.S. Constitution, Sixth Amendment 1, 15, 28

U.S. Constitution, Fourteenth Amendment 1

N.Y. Constitution, Article 6 2

TABLE OF AUTHORITIES – Continued

Page

TREATIES

Prisoner Exchange Treaty, March 2, 1977, United States-Canada, 30 U.S.T. 6263, T.I.A.S. No. 9552 ..... 6, 9, 10

Second Protocol Amending the Extradition Treaty with Canada, 107th Congress, 2d Session, United States Senate, Treaty Doc. No. 107-11 ..... 10, 11, 14, 27

Treaty on Extradition between United States and Canada, March 22, 1976, 27 U.S.T. 983, T.I.A.S. No. 8237 ..... 6, 7, 8, 9, 28, 30

FEDERAL STATUTE

28 U.S.C. § 1257 1

STATE STATUTES

New York Civil Rights Law § 12 2

New York Criminal Procedure Law § 30.20 ..... 2, 10

New York Criminal Procedure Law § 470.15(3) 2, 14, 32

New York Criminal Procedure Law § 580.20 ..... 2, 10

New York Criminal Procedure Law § 580.30 ..... 2, 7

New York Penal Law § 125.20(1) 3, 13

New York Penal Law § 125.25 ..... 3, 5

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Black's Law Dictionary (8th ed. 2004).....28

OPINIONS BELOW

The opinion of the New York State Court of Appeals is reported and cited as *People v. Romeo,* 12 N.Y.3d 51 (2009), *see* Appendix 1a-11a. The opinion of the New York State Supreme Court, Appellate Division, Second Department is reported and cited as *People v. Romeo,* 47 A.D.3d 954, 849 N.Y.S.2d 666 (2d Dept. 2008). Appendix 12a-18a. The memorandum decision and order of the County Court of Suffolk County dated December 4, 1999 is not reported. Appendix 19a-23a.

JURISDICTION

The New York State Court of Appeals entered its judgment on February 11, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial."

The Fourteenth Amendment to the United States Constitution provides, in part, that "[n]o state shall

. . . deprive any person of life, liberty, or property, without due process of law."

The New York State Constitution, Article 6, provides, in part, that "[n]o person shall be deprived of life, liberty or property without due process of the law."

New York Civil Rights Law § 12 provides, in part, that "[i]n all criminal prosecutions, the accused has a right to a speedy . . . trial."

New York Criminal Procedure Law § 30.20 provides, in part, that "[a]fter a criminal action is commenced, the defendant is entitled to speedy trial."

New York Criminal Procedure Law § 470.15(3) provides, in part, that an intermediate appellate court may reverse a judgment of conviction upon the law, or upon the facts, or "[a]s a matter of discretion in the interests of justice."

New York Criminal Procedure Law § 580.20 provides, in part, that under the interstate agreement on detainers, "[s]tate shall mean a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico."

New York Criminal Procedure Law § 580.30 provides, in part, that "[a] defendant against whom a criminal action is pending in a court of record of this state, and who is confined in a federal prison or custody either within or outside the state, may, with the consent of the attorney general of the United

States, be produced in such court for the purposes of criminal prosecution . . . upon application of the district attorney of such county . . . "

New York Penal Law § 125.20(1) provides, in part, that a person is guilty of manslaughter in the first degree when "with intent to cause serious physical injury to another person, he causes the death of such person . . . "

New York Penal Law § 125.25 provides in part, that a person is guilty of murder in the second degree when "[w]ith intent to cause the death of another person, he causes the death of such person or of a third person . . . or [u]nder circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person . . . "

STATEMENT OF THE CASE

Sometime between November 2 and November 8, 1985, respondent shot John Starkey multiple times and caused his death. This killing took place in the Fire Island village of Saltaire in Suffolk County, New York. Investigation led to respondent and, eventually, his father surrendered two guns to the Nassau County police on July 31, 1986. One of them, a Smith & Wesson .357 revolver registered to respondent, was the murder weapon. On September 9, 1986, the FBI fired bullets from this gun and matched them to

bullets recovered from the body of John Starkey. On March 12, 2001, Suffolk County forensic analysts determined that human hairs recovered from inside the fist of John Starkey had DNA matching respondent. For over twenty years, there has been no doubt who killed John Starkey.

On February 19, 1987, Suffolk County Court Judge Thomas Mallon ordered respondent to provide blood and hair samples. Respondent's retained attorney, Stephen Scaring, Esq., agreed to have his client surrender for exemplars on March 5, 1987.

On March 3, 1987, respondent drove to Canada. He brought with him a Winchester lever-action rifle, a crossbow with arrows, and assorted firearm ammunition. He did not surrender for exemplars in New York on March 5, 1987.

On March 8, 1987, New Brunswick Constable Emmanuel Aucoin stopped respondent for speeding, a few miles north of the Maine border. While Constable Aucoin sat in his vehicle reviewing the license and registration, respondent got the rifle from his Porsche hatchback. Standing in the roadway, he fired into the side of Constable Aucoin's head, killing him instantly. Respondent then retrieved his identification, threw the rifle in the woods, and drove away. He reentered the United States at the St. Stephen-Calais border crossing and went to Bangor International Airport in Maine to purchase a one way plane ticket to Ft. Lauderdale, Florida. At Logan International Airport in Boston, Massachusetts, police had respondent's

name and description so they arrested him for the Canadian murder that same day.

On March 9, 1987, respondent appeared before United States Magistrate Robert B. Collings in Boston, Massachusetts and was ordered held without bail pending extradition to Canada.

On March 11, 1987, Suffolk County authorities obtained the court-ordered hair and blood samples from respondent while he was in federal custody in Boston. On March 18, 1987, the hair samples from respondent were found to be consistent with the hair recovered from the fist of John Starkey.

On March 27, 1987, respondent was indicted under Suffolk County Indictment No. 392-87 for two counts of murder in the second degree under New York State Penal Law §§ 125.25(1) and 125.25(2). That same day, Suffolk County Court Judge Alfred Clifford Tisch issued a New York superior court warrant of arrest. This warrant was entered into the National Crime Information Computer and lodged as a detainer in Massachusetts.

On March 31, 1987 and April 28, 1987, Magistrate Collings in Boston reviewed the Canadian request for international extradition. During this time, discussions were had about where Romeo would be tried first. Counsel for respondent sent letters objecting to letting Canada prosecute first, two dated April 1, 1987, in which he insisted that respondent had a constitutional right to be prosecuted in New York before being extradited to Canada. Letters in

response to the Scaring correspondence were dated April 3 and April 20, 1987. Suffolk County District Attorney Patrick Henry chose to honor Canada's request to prosecute first. Magistrate Collings signed a certificate of extraditability on April 28, 1987.

Pursuant to defense request for better psychiatric care on May 5, 1987, respondent was transferred to Springfield, Missouri on May 28, 1987, where he remained in federal custody during his appeal to the United States Court of Appeals for the First Circuit from the denial of his federal habeas challenge to the international extradition.

On May 5, 1987, General Counsel William H. Corbett in Ottawa, Canada wrote a letter to Assistant District Attorney Edward Jablonski, who was then Chief of the Suffolk County District Attorney's Office Homicide Bureau. Corbett explained that under the then existing Treaty on Extradition between United States and Canada, March 22, 1976, 27 U.S.T. 983, T.I.A.S. No. 8237, there was no provision for a Canadian sentenced prisoner to be returned to Canada after an extradition to the United States. Appendix 24a-43a. Thus, prior to extradition, the Canadian sentence would have to be served completely or commuted. However, Corbett did point out that there were two other possibilities. The prisoner himself could seek to serve his Canadian sentence in the United States under the Prisoner Exchange Treaty, March 2, 1977, United States-Canada, 30 U.S.T. 6263, T.I.A.S. No. 9552. Also, once the Treaty on Extradition was amended to allow respondent to be

returned for completion of his Canadian sentence after conviction or acquittal in New York, Corbett assured that the Ministry of the Attorney General in New Brunswick would support an early return of respondent to New York.

On June 1, 1987, counsel for respondent brought an order to show cause in New York demanding respondent be produced for arraignment by a writ of habeas corpus ad prosequendum under New York State Criminal Procedure Law § 580.30. In our affidavit in opposition dated June 12, 1987, we denied there had been any unreasonable delay, either pre-indictment or post-indictment. The belief that the Canadian murder prosecution would happen more quickly than a New York murder prosecution was based in part upon representations from officials in New Brunswick.

On June 15, 1987, the Suffolk County Court heard oral argument on the order to show cause. Respondent's attorney asked for at least a New York arraignment before respondent was extradited to Canada. Assistant District Attorney Timothy Mazzei pointed out that New York State Criminal Procedure Law § 580.30 required the exercise of prosecutorial discretion and was not a basis for the court to compel arraignment. He denied there was any hidden reason for letting Canada go first. He also anticipated their cooperation in the return of respondent to New York soon after his trial in Canada.

On June 17, 1987, the Suffolk County Court denied the application and held that the decision to defer prosecution until the conclusion of the Canadian murder prosecution was neither arbitrary nor unreasonable and such prosecutorial discretion could not be overruled by judicial determination or defense motion. All parties were aware of a possible future motion to dismiss but there was no prospective ruling on the merits of such an application. The Suffolk County Court also found no benefit for respondent to personally enter a not guilty plea in New York prior to being prosecuted in Canada because the show cause hearing had provided the functional equivalent of a not guilty plea.

In 1987, after respondent was tried and retried in Canada, he was convicted for murder in the first degree. The Canadian sentence was twenty-five years to life imprisonment.

The Treaty on Extradition between the United States and Canada, in force since March 22, 1976, provides for the international extradition of fugitives for specific criminal offenses but with certain limitations. Appendix 24a-54a. Under Article 7, each sovereign nation has discretion to defer the surrender of a fugitive while judicial process is pending and until the full execution of any punishment that has been awarded. Appendix 30a-31a. Prior to 2003, the treaty contained no provision for the temporary borrowing of prisoners already serving a sentence. More precisely, although Canada could have consented to transfer respondent to the United States

prior to the expiration of his Canadian sentence, there was no mechanism for him to be returned to Canada after the New York prosecution ended in either conviction or acquittal. This impediment, and the glacial pace for the process to amend the treaty, thwarted Canada's previously stated desire to cooperate in an early return of respondent to New York. At no time did respondent seek to serve his Canadian sentence in the United States under the separate Prisoner Exchange Treaty.

In a letter dated March 24, 1988, Robert A. Murray, Director of Public Prosecutions in New Brunswick, Canada, explained that respondent could only go to New York after two conditions were satisfied: (1) the appeals to the New Brunswick Court of Appeals and the Supreme Court of Canada had to be finally concluded; and (2) respondent would have to initiate his transfer. Therefore, there would be no extradition prior to the completion of the Canadian sentence or until the Treaty on Extradition was amended to permit the prisoner's return to Canada. Unbeknownst to anyone in 1988, that process would take fifteen years.

In a letter dated March 17, 1989, Paul S. Vaky, an attorney for the United States Department of Justice, Office of International Affairs, explained to Suffolk County Assistant District Attorney Timothy Mazzei that an extradition could only proceed if Canada chose to commute the sentence for the murder of a Canadian policeman and that was "not very likely."

On July 17, 1999, respondent's counsel moved to dismiss the New York indictment under New York State Criminal Procedure Law § 30.20 for violation of the constitutional right to a speedy trial. In our affidavit in opposition with memorandum of law dated August 13, 1999, we noted that the treaty problem had been addressed in Canada by an amendment dated June 17, 1999 but that the United States Senate had yet to ratify the new protocol. We again noted that under the Prisoner Exchange Treaty, respondent could have applied to serve his Canadian sentence in the United States but this procedure could only be initiated by respondent. If respondent began to serve his Canadian sentence in United States custody, he could have then sought relief under the Interstate Agreement of Detainers, which is codified under New York Criminal Procedure Law § 580.20. However, those provisions only apply to sentenced prisoners in the United States. The reply memorandum was dated September 2, 1999.

On December 7, 1999, Suffolk County Court Judge Joel L. Lefkowitz denied the motion to dismiss and held appellant's constitutional right to a speedy trial had not been denied. Appendix 19a-23a. The Suffolk County Court found justification for twelve years delay. The Court also agreed that requesting a commutation of the Canadian murder sentence was futile.

On January 12, 2001, the Second Protocol Amending the Extradition Treaty with Canada was signed by the duly authorized representatives of the United States and Canada. After the ratification

process in the United States Senate, the Second Protocol entered into force on April 30, 2003. See 107th Congress, 2d Session, United States Senate, Treaty Doc. No. 107-11. Appendix 50a-54a. Respondent could now be returned to Canada after he was borrowed for prosecution in New York.

Suffolk County in New York was the first jurisdiction in the United States to use the new provisions under the Second Protocol for a temporary surrender from Canada. Our formal request for the temporary surrender of respondent was submitted to the United States Department of Justice on June 3, 2003, only thirty-four days after such a request became possible. Thereafter, our application was also reviewed by the United States State Department before it went to Canada. In Canada, the request received both executive review in the Canadian Ministry of Justice and judicial review in Canadian courts. Respondent was entitled to separately appeal these rulings in Canada. Eventually, respondent was transferred from Canadian custody to United States Marshals and was brought to Suffolk County for arraignment on November 10, 2005.

On February 2, 2006, respondent appeared in the County Court of Suffolk County with the same attorney that had represented him since 1987. In return for pleading guilty to manslaughter in the first degree, as reduced from murder in the second degree under count one, all parties agreed the bargained-for sentence would be an indeterminate term of imprisonment from seven years to twenty-one years in

satisfaction of the New York indictment. The Court also agreed this sentence would be served concurrently to the Canadian sentence.

Under oath, respondent acknowledged that he was giving up certain rights by pleading guilty, including the right to suppress evidence, to have a jury trial, and to cross-examine the witnesses who testified against him. Respondent agreed he was giving up the right to remain silent and the right to call witnesses in his defense. Respondent specifically stated that he understood he was giving up any defenses he may have had to these charges and that he had discussed those defenses with his attorney. Then the Court separately addressed a waiver of the right to appeal. Respondent agreed he was voluntarily waiving his right to appeal as part of the bargained-for disposition.

When specifically asked on the record, counsel for respondent replied that he had no doubts about his client's competency. The inquiry then turned to respondent for a factual allocution. Respondent admitted murdering Constable Aucoin in March 1987 and receiving a sentence of twenty-five years to life imprisonment in Canada. In November 1985, respondent's parents owned a home in Saltaire on Fire Island in Suffolk County. Respondent admitted to meeting and knowing John Starkey. He had visited the Starkey house in Saltaire once or twice. Respondent admitted that between November 2 and November 8, 1985, he used his registered .357 handgun to shoot Starkey multiple times. Respondent admitted

he did so with intent to cause serious physical injury and that he did cause Starkey's death. Respondent also admitted using the same gun to shoot a deer prior to killing Starkey and that he buried the animal to hide that fact. Respondent acknowledged that the gun used to shoot Starkey was surrendered to police in Nassau County. Respondent then pled guilty to manslaughter in the first degree. New York State Penal Law § 125.20(1).

On February 16, 2006, respondent appeared for sentencing in the County Court of Suffolk County. Counsel for respondent indicated that this was a negotiated plea for a specific sentence of seven years to twenty-one years imprisonment which would be concurrent to the Canadian sentence. He asked that respondent be returned to Canada as soon as possible so the New York sentence could commence. Respondent apologized for putting both the Starkey family and his own family through so much pain, grief and sadness. He expressed deep regret for not telling the truth about what happened in 1985 because then the situation in Canada would have never happened. Suffolk County Court Judge Barbara Kahn then sentenced respondent to the bargained-for indeterminate term from seven years to twenty-one years imprisonment, to be served concurrently to the Canadian sentence. Both respondent and his counsel separately stated on the record that all appellate issues with regard to this prosecution had been waived.

Notice of appeal was filed on March 14, 2006. Attorneys for respondent perfected the appeal with an appellant's brief dated April 13, 2007. The sole legal issue was whether there had been a violation of the constitutional right to a speedy trial. Our respondent's brief was dated July 15, 2007. We also submitted a copy of the Second Protocol with a cover letter citing judicial notice. A reply brief was dated July 20, 2007. Oral argument was heard on December 3, 2007.

On January 29, 2008, the Supreme Court of New York, Appellate Division, Second Department, reversed the judgment of conviction and dismissed the indictment based on the delay between 1987 and 1999, which had been preserved for review by the unsuccessful motion in 1999. Appendix 12a-18a. The Appellate Division chose to dismiss, not under its interest of justice jurisdiction under New York State Criminal Procedure Law § 470.15(3), but by ruling the 1999 motion to dismiss should have been granted as a matter of law.

Grounds for leave to appeal to the New York State Court of Appeals were set forth in a letter dated April 4, 2008. Counsel for respondent opposed leave in a letter dated April 4, 2008. On May 8, 2008, Associate Judge Susan Phillips Read granted leave to appeal to that Court. Appellant's brief was dated July 7, 2008. Respondent's brief was dated August 25, 2008. Oral argument was heard on January 7, 2009. On February 11, 2009, the New York State Court of Appeals affirmed the Appellate Division reversal and

held that respondent was denied his federal constitutional right to a speedy trial. Appendix 1a-11a.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. THE NEW YORK STATE COURT OF APPEALS FAILED TO GIVE PROPER WEIGHT TO RESPONDENT'S PROPORTIONATE RESPONSIBILITY FOR THE DELAY

United States Supreme Court jurisprudence involving the Sixth Amendment right to a speedy trial requires balancing four factors in light of both a criminal defendant's rights and the public's right to justice. *Vermont v. Brillon,* 556 U.S. ___, 129 S.Ct. 1283 (2009); *Doggett v. United States,* 509 U.S. 647 (1992); *Barker v. Wingo,* 407 U.S. 515 (1972).[1] A fair judicial resolution for the 1985 killing of Richard Starkey was attained in 2006 when respondent pleaded guilty to manslaughter until New York State appellate courts decided this proceeding could not be allowed even if it had been done in 1999. The New York State Court of Appeals did not extend state constitutional law beyond the protection provided by the federal constitutional right to a speedy trial,

[1] They are (1) length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. *Barker v. Wingo,* 407 U.S. at 530.

Oregon v. Gozek, 546 U.S. 517 (2006) (possibility of state law basis for ruling will not preclude United States Supreme Court review), but they did apply their own five factor test from *People v. Taranovich,* 37 N.Y.2d 442 (1975).[2]

Assessing "reason for delay" as simple causation, the New York Court of Appeals agreed with the Appellate Division that the decision to defer the Suffolk County prosecution to the Canadian prosecution was the cause of delay rather than the Canadian murder itself. The New York Court of Appeals also found it unreasonable for the Suffolk County District Attorney's Office to later accept the opinion of Canadian and United States officials that an extradition based on the commutation of the Canadian sentence was very unlikely. Both appellate courts ruled that due diligence required a formal request to Canada for early extradition, despite respondents' unworthiness for such a commutation and the undesirable nature of requesting such a commutation under precepts of international comity. Focusing just on the New York murder in the second degree prosecution, the New York State Court of Appeals recognized no United States interest in the prosecution and punishment for the Canadian murder in the first degree.

---

[2] They are (1) extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether there has been an extended period at pretrial incarceration; and (5) whether there is any indication, that the defense has been impaired by the delay. *People v. Taranovich,* 37 N.Y.2d at 445.

Two logical and problematic consequences flow from these appellate determinations. First, foreign prosecutions should never be given precedence, no matter what the surrounding circumstances might be. Secondly, international concerns can play no role in deciding the proper order of criminal prosecutions. These judicial mandates are contrary to the constitutional separation of executive power and should not be allowed to stand. *Martin v. Warden, Atlanta Pen.*, 993 F.2d 824 (CA 11 1993); *United States v. Reumayr,* 530 F.Supp.2d 1200 (D.N.M. 2007). The constitutional right to a speedy trial is relative, can coexist with delay, and depends on the circumstances of the particular case. *Beavers v. Haubert,* 198 U.S. 77, 87 (1905).

Therefore, we urge this Court to find that the reasonable explanations for the government's role in the length of delay were far outweighed by respondent's own conduct as a multijurisdictional offender and international fugitive. The Canadian murder was the genesis for all the delay in prosecuting the New York murder. Sadly, the New York appellate courts found no public justice interest in the 2006 plea and sentence, despite statements to the contrary by all parties concerned at those proceedings. A fair balancing of all of the appropriate factors should have resulted in the recognition that respondent was more blameworthy for the delay and that he was not denied his constitutional right to a speedy trial. Justice for Richard Starkey and his family should not have been so easily erased.

The decision of the New York State Court of Appeals which discounts respondent's role in the delay is contrary to many federal and state decisions. *Vermont v. Brillon,* 556 U.S. ___; *Doggett v. United States,* 509 U.S. 647; *Barker v. Wingo,* 407 U.S. 515; *United States v. Williams,* 557 F.3d 943 (CA 8 2009) (must weigh conduct of both government and defendant); *United States v. Fuller,* 2009 WL 22886 (CA 7 (Ill.)) (apportionment of blame is of particular importance); *Goodrum v. Quarterman,* 547 F.3d 249, 258 (CA 5 2008) (delays explained by valid reasons or attributable to defendant's conduct do not weigh against state), *cert. denied,* ___ S.Ct. ___, 2009 WL 735703 (U.S.); *United States v. Ramos,* 264 Fed. Appx. 57 (CA 2 (N.Y.)) (even if government was partially to blame, defendant was principally to blame for delay), *cert. denied,* ___ U.S. ___, 128 S.Ct. 2925 (2008); *United States v. Corona-Verbera,* 509 F.3d 1105, 1116 (CA 9 2007) (after extradition was no longer futile, government exercised due diligence so reason for delay weighed against dismissal), *cert. denied,* ___ U.S. ___, 129 S.Ct. 149 (2007); *United States v. Brown,* 498 F.3d 523, 531 (CA 6 2007) (defendant's conduct is relevant to assessing reason for delay), *cert. denied,* ___ U.S. ___, 128 S.Ct. 674 (2007); *Williams v. Bartow,* 481 F.3d 492, 506 (CA 7 2007) (valid reason for delay, in absence of deliberate attempt to hamper the defense, is not counted against the state); *United States v. Bass,* 460 F.3d 830, 837 (CA 6 2006) (six years due to unrelated prosecution and pretrial litigation not blamed on government), *cert. denied,* ___ U.S. ___, 127 S.Ct. 2959 (2007);

Rashad v. Walsh, 300 F.3d 27, 40 (CA 1 2002) (where defendant bears more responsibility for delay, it cannot redound to his benefit), *cert. denied*, 537 U.S. 1236 (2003); *Castro v. Ward*, 138 F.3d 810, 820 (CA 10) (principal reason for delay was defendant's commission of unrelated murder), *cert. denied sub nom. Castro v. Gibson,* 525 U.S. 971 (1998); *Cowart v. Hargett,* 16 F.3d 642, 647 (CA 5) (defendant's conduct must also be considered), *cert. denied,* 513 U.S. 886 (1994); *State v. Griffin,* ___ N.W.2d ___, 2009 WL 304455 (Minn. App.) (delay due to good cause is not a violation); *Murphy v. State,* ___ S.W.3d ___, 2009 WL 279513 (Tex. App. – Fort Worth) (valid reason for delay is not weighed against government); *State v. Oliveira,* 961 A.2d 299 (R.I. 2008) (defendant cannot take advantage of delay for which he is responsible, whether caused by action or inaction); *Green v. State,* 295 Ga. App. 468, 672 S.E.2d 414 (2008) (if government has not deliberately attempted to delay trial in order to hamper defense, relatively benign reason for delay is not weighted heavily); *People v. Crane*, 195 Ill. 2d 42, 743 N.E.2d 555, 252 Ill. Dec. 687 (2001) (justified delay does not count against the state); *People v. Torres*, 289 Ill. App. 3d 513, 682 N.E.2d 261, 224 Ill. Dec. 700 (1997) (failure to seek extradition from Mexico did not make government responsible for delay where defendant violated court order and made no request from Mexico to resolve charges; prejudice from delay was directly traceable to defendant's conduct); *State v. Monson,* 84 Wash. App. 703, 929 P.2d 1186 (Div. 3) (violation requires expiration of reasonable time, not fixed time; thirteen years was

reasonable due to unamenability for extradition), *review denied,* 946 P.2d 403 (1997); *Gilmore v. State,* 655 N.E.2d 1225 (Ind. 1995) (no timely assertion of right and no showing of particularized prejudice meant no violation where defendant's flight to sister state was main cause for delay); *State v. Stow,* 136 N.H. 598, 620 A.2d 1023 (1993) (incarceration in another jurisdiction for pending charge can excuse delay in extradition because simultaneous prosecutions are impossible; due diligence does not require extradition prior to completion of foreign proceedings).

During the speedy trial inquiry in 1999, the Suffolk County District Attorney's Office showed how respondent's conduct should be weighed in assessing the reasonableness of the reason for the delay. The County Court's agreement with that position was not challenged again until the 2006 appeal from the plea and judgment. *United States v. Mendoza,* 530 F.3d 758 (CA 9 2008). Thus twelve years of delay, from 1987 to 1999, had been reasonably explained for appellate review. *Heiser v. Ryan,* 15 F.3d 299 (CA 3) (thirteen years delay explained), *cert. denied sub nom. Heiser v. Stepanik,* 513 U.S. 926 (1994). We maintain respondent was not due anything more until the treaty was finally amended in 2003. With no further challenges prior to or contemporaneous with the guilty plea in 2006, raising this issue on appeal was sandbagging by respondent's counsel. Due diligence after 1999 was never litigated at the trial level.

a. Uncommon length of delay triggers inquiry but by itself does not justify dismissal as a matter of law

Even a significant elapse of time does not, by itself, justify dismissal as a matter of law. *Barker v. Wingo,* 407 U.S. at 523; *United States v. Arceo,* 535 F.3d 679 (CA 7 2008); *Elcock v. Henderson,* 28 F.3d 276 (CA 2), *cert. denied sub nom. Elcock v. Walker,* 513 U.S. 977 (1994) (eight years for direct appeal not a violation); *Rashad v. Walsh,* 300 F.3d at 41. Length of delay initially operates as a trigger without which there is no further inquiry into a possible constitutional violation. *Barker v. Wingo,* 407 U.S. 515; *United States v. Jackson,* 549 F.3d 963 (CA 5 2008). Although the New York Court of Appeals explicitly recognized the *ad hoc* nature of a constitutional speedy trial inquiry, Appendix 5a, they affirmed the Appellate Division's decision on the law and agreed that the case should have been dismissed in 1999. We maintain denying the 1999 motion to dismiss was an appropriate exercise of discretion. The presumption created by extraordinary delay is rebuttable and does not represent a statistical probability of prejudice. *Doggett v. United States,* 509 U.S. at 652, n.1; *United States v. Rogers,* 94 F.3d 657 (CA 10 1996).

Assessing whether the constitutional right to a speedy trial has been denied should focus on governmental motives rather than mere time computation. Prosecutorial readiness is already measured by statute. Since civilized society has chosen not to impose any statute of limitations when a defendant is

charged with murder, the length of delay factor for such grave offenses must be open-ended. *Barker v. Wingo,* 407 U.S. at 530-531. If we had chosen to indict respondent much later than 1987, the ensuing due process inquiry would not have involved any specific length of time requiring dismissal as a matter of law. The attachment of the constitutional right to a speedy trial upon indictment started a clock, not a timer, which ceased at the entry of the guilty plea. Otherwise, rulings based on length of delay alone would leave little difference between the statutory and constitutional protections on this issue. Time, by itself, does not extinguish the public interest in the fair administration of justice. *Doggett v. United States,* 509 U.S. at 656; *United States v. Loud Hawk,* 474 U.S. 302 (1986); *Elcock v. Henderson,* 947 F.2d 1004, 1008 (CA 2 1991).

b. Reason for delay involves more than simple causation analysis and this Court requires blame for delay to be apportioned between the defendant and the government, particularly when, as here, respondent was a multijurisdictional offender and international fugitive

The second factor known as "reason for delay" involves more than simple causation analysis. All the factual circumstances that led to delay in prosecuting respondent have to be considered in context. This factor could more precisely be called "reasonableness of the explanation for delay." *Conroy v. Leone,* 2009

WL 597582 (CA 3 2002) ("reasonable reason for delay"); *Goodrum v. Quarterman,* 547 F.3d at 258-259; *United States v. Fei,* 57 Fed. Appx. 879 (CA 2 2002), *cert. denied sub nom. Zhang Ai Ping v. United States,* 539 U.S. 936 (2003) (valid reason for delay); *Rashad v. Walsh,* 300 F.3d at 36 (responsibility for delay); *Hakeem v. Beyer,* 990 F.2d 750, 766-772 (CA 3 1993) (finding of governmental negligence must be based on evidentiary hearing). The New York Court of Appeals gave little or no weight to the principal cause of delay in this case, which was respondent's conduct in becoming an international fugitive. That Court highlighted two subsequent governmental decisions as the cause of delay but neither of them would have occurred but for respondent's international flight from justice and murder of Constable Aucoin.

Respondent caused delay in his prosecution for the murder of John Starkey in 1987 in many ways. He defied the court order for exemplars despite the representations of his attorney. He fled the United States to avoid arrest. He murdered Constable Aucoin in Canada. He got arrested in Boston, Massachusetts, on the Canadian warrant within twenty-four hours of the Aucoin murder. He filed legal challenges in New York and Massachusetts to stop his lawful extradition to Canada. By litigating in Canada (including a trial, an appeal, and a retrial), he delayed being available for extradition from Canada. After the 1987 attempt to prematurely force an arraignment in New York prior to the extradition to Canada, twelve years went by before respondent's attorney made the single motion to dismiss. While serving his Canadian

sentence, respondent never requested a transfer to serve his Canadian sentence in the United States. These actions were not consistent with that of a person who truly wanted a speedy trial in New York. *United States v. Wanigasinghe,* 545 F.3d 595, 598 (CA 7 2008), *cert. denied,* ___ U.S. ___, 2009 WL 289717 (U.S.); *United States v. Brown,* 498 F.3d at 532. Like many criminal defendants, these actions (and those of his attorneys), were designed to avoid facing accountability.

The assertion of one's legal rights is legitimate but it still remains blameworthy in the context of whether the right to a speedy trial was aggressively asserted. *Barker v. Wingo,* 407 U.S. at 528-529 (assertion of right must be frequent and forceful); *Wood v. Vasbinder,* 2009 WL 383681 (CA 6 (Mich.)) (one bail request did not demonstrate eagerness for trial); *State v. Oliveira,* 961 A.2d 299 (defendant must aggressively assert his right to a speedy trial). Respondent's actual desire was always for a dismissal of the New York indictment and not a timely prosecution for the Starkey killing. Respondent's posture as an aggrieved defendant who wanted his day in court remains inauthentic and contrived to this day. As a multijurisdictional offender, he was trying to use his international fugitive status to gain a tactical advantage prior to extradition. He was not "banging on the courthouse doors." *State v. Bleau,* 668 A.2d 642, 645 (R.I. 1995) (single request to counsel following unlawful absence from jurisdiction was insufficient assertion). Meanwhile, the role of the Suffolk County District Attorney's office in respondent's international

extradition was neither an "abuse of process" nor based on a "want of good faith." *United States v. Rauscher,* 119 U.S. 408, 424 (1886), citing *United States v. Caldwell,* 8 Blatchf. 131, 25 F. Cas. 237 (C.C.S.D.N.Y. 1871).

In 1999, the County Court of Suffolk County recognized this reality. The overwhelming cause of delay in prosecuting the New York indictment was the Canadian murder. The 1987 attempt to assert the constitutional right to a speedy trial was premature. The motion to dismiss in 1999 preserved twelve years and nine months delay for appellate review but it did not alter the equation for how blame should be apportioned between respondent and the Suffolk County District Attorney's Office. The decision to let Canada prosecute first was a direct consequence of respondent's monstrous murder of Constable Aucoin, the true cause of delay. Moreover, the subsequent decision not to seek commutation of the Canadian sentence should not be considered a cause for delay at all since Canadian unwillingness to jeopardize their conviction was apparent and easily understood. Mere conjecture to the contrary does not support attribution of blame to the government. Ultimately, a fair apportionment of blame for the delay must rest upon respondent for defying court ordered exemplars, fleeing to Canada, and committing murder in that foreign nation.

c. Respondent's re-entry into the United States did not require New York to prosecute first and there should be no "duty not to defer" when prosecuting agencies resolve who will be the first to prosecute a multijurisdictional offender

In an age of international criminal syndicates and worldwide networks of terrorists, there is no compelling reason to give multijurisdictional offenders a benefit for committing crimes in more than one country. When more than one sovereign nation seeks criminal prosecution of the same individual, there is a uniquely executive decision to be made on who will go first. *Yapp v. Reno,* 26 F.3d 1562, 1565 (CA 11 1994); *Martin v. Warden, Atlanta Pen.*, 993 F.2d at 829. There is no possibility of simultaneous prosecutions so one jurisdiction will have to defer to the other. *United States v. Hall,* 551 F.3d 257 (CA 4 2009). Without any doubt, the right to make this determination does not belong to the fugitive or his legal representative. *Tavarez v. United States Atty. Gen.,* 668 F.2d 805 (CA 5 1982). If the magnanimity of the deferring nation will create a risk of future dismissal, an obligation not to defer has been created. This duty is contrary to the public interest in the orderly prosecution of multijurisdictional offenders and an affront to the desirable goal of comity among nations. Accordingly, respondent did not have a constitutional right to be prosecuted in the United States first.

Respondent has pointed to two factors which could have supported a decision to let Suffolk County

prosecute before Canada, but they are hardly persuasive. The fact that the crime in New York preceded the crime in Canada is not controlling. The relative ease with which respondent could have been transferred from federal custody (in either Massachusetts or Missouri) to New York prior to international extradition is also an uncompelling factor. Meanwhile other factors supported the Canadian request to go first. Murder of a law enforcement officer was murder in the first degree as opposed to murder in the second degree. Their case was relatively easier to prove since the traffic stop connected respondent to the crime. The initial arrest was based solely on the Canadian warrant. The Canadian crime, charge, and warrant all preceded the New York indictment. The location of that initial arrest was a matter of chance determined by respondent's inability to maintain his fugitive flight. Treaties protect the United States' right to prosecute its cases before sending fugitives to foreign nations but there should be no requirement to do so in every case.

Although the 2003 Second Protocol now allows Canada to regain a borrowed prisoner, this type of situation could still arise under a different extradition treaty with another nation. When there are multiple prosecuting agencies deciding on who should be the first to prosecute an international fugitive in the custody of a third jurisdiction, higher executive authorities have to be able to impose their determination to end any political stalemate without judicial involvement. *Yapp v. Reno,* 26 F.3d at 1568. *See*

Treaty on Extradition, Article 13 at Appendix 34a. The political decision to defer extradition to Canada was a constitutional function of the executive branch under the separation of powers in the United States whether made by the Suffolk County District Attorney or the United States Attorney General. *Mironescu v. Costner,* 480 F.3d 664 (CA 4 2007), *cert. denied,* ___ U.S. ___, 128 S.Ct. 976 (2008). Letting another nation prosecute first will be appropriate in some cases. The decision of the New York State Court of Appeals is an unconstitutional judicial limitation on the opportunity to exercise that executive authority. Deferring prosecution in 1987 to Canada was entirely proper. There should be no universal "duty not to defer" to a noncustodial foreign nation seeking international extradition. *Neely v. Henkel,* 180 U.S. 109, 123 (1901); *Sabatier v. Dabrowski,* 586 F.2d 866, 869 (CA 1 1978) (Sixth Amendment not applied to international extradition proceedings); *Jhirad v. Ferrandina,* 536 F.2d 478, 485 n.9 (CA 2) (same), *cert. denied,* 429 U.S. 833 (1976).

d. Due diligence does not require a futile request for extradition and there should be no duty to request the commutation of a Canadian sentence for murder in the first degree

The law compels no one to do vain or useless things[3] and requesting commutation of the Canadian

---

[3] "*Lex neminem cogit ad vana seu inutilia peragenda,*" Black's Law Dictionary 1730 (8th ed. 2004).

murder sentence was a futile act. *United States v. Ocampo*, 266 Fed. Appx. 63 (CA 2 2008); *United States v. Corona-Verbera*, 509 F.3d 1105; *Montalvo v. United States*, 862 F.2d 425 (CA 2 1988); *United States v. Blanco*, 861 F.2d 773 (CA 2 1988), *cert. denied*, 489 U.S. 1019 (1989); *United States v. Diacolios*, 837 F.2d 79 (CA 2 1988). The New York State Court of Appeals recognized that where a foreign country demonstrates a clear intention to deny an extradition request, the prosecution is under no obligation to make a futile gesture. However, it concluded that "nothing in this record demonstrates that a request here would have been futile." Appendix 8a. It erroneously accepted respondent's theoretical possibility that Canada might have agreed to commuting their substantial sentence of imprisonment despite letters from Canadian and United States officials in the record stating otherwise in plain language.

In the letter dated May 15, 1987, General Counsel William H. Corbett in Ottawa described Canada's firm position not to let respondent be borrowed when there was no mechanism available to return him to Canada. Understandably, Canada did not find it wise to commute a Canadian sentence for the opportunity to have respondent tried in New York. If respondent had somehow won an acquittal in New York, he would have been able to avoid punishment for both murders. This risk was negligible in light of the evidence that respondent killed Starkey but it was just not worth taking. At the end of the letter, Corbett expressed the

position of the Attorney General of New Brunswick that the only way respondent could go to New York prior to the completion of his Canadian sentence was if the treaty were amended to permit his return to complete that Canadian sentence.

In the letter dated March 24, 1988, Robert A. Murray, the Director of Public Prosecutions in New Brunswick, explained that a prisoner initiated-transfer was the only way to get respondent to the United States prior to the completion of his Canadian sentence.

In the letter dated March 17, 1989, Paul S. Vaky, from the United States Department of Justice, Office of International Affairs, assessed the possibility of Canada commuting a sentence for the murder of a Canadian policeman as "not very likely."

One may quibble over the functional equivalence of "unlikely" and "futile" but to say the record contained no indication of the Canadian position is stunningly in error. Standard procedure in international relations between a foreign county and the various non-federal levels of American government is to channel all official communications through the Office of International Affairs in the United States Department of Justice in Washington, D.C. *United States v. Hooker,* 607 F.2d 286 (CA 9 1979). *See* Treaty on Extradition, Article 9 at Appendix 31a; Article 14 at Appendix 35a.

The Suffolk County District Attorney's office was entitled to rely upon the representations that were made to it in writing. The absence of a more formal

request to extradite respondent does not change this reality. *United States v. Walton,* 814 F.2d 376 (CA 7 1987); *United States v. Salzmann,* 548 F.2d 395 (CA 2 1976); *People v. Perez,* 229 Cal. App. 3d 301, 379 Cal. Rptr. 915 (2 Dist. Ca. 1991). Due diligence should not require a quixotic pursuit based on illogical speculation. *United States v. Mendoza,* 530 F.3d 758; *People v. Donaldson,* 103 Mich. App. 42, 302 N.W.2d 592 (1981); *Cf. United States v. Pomeroy,* 822 F.2d 718 (CA 8 1987) (federal prosecutors should have requested Canada to commute five year robbery sentence). Speedy trial challenges predicated upon interference with a foreign sentence of imprisonment should be rejected. *People v. Mackle,* 241 Mich. App. 583, 617 N.W.2d 339, *app. denied*, 620 N.W.2d 856 (2000).

e. Reasonableness of the government's explanation for delay was a proper basis to deny the 1999 motion to dismiss and respondent's conviction was not reversible as a matter of law

Since the decision to defer to Canada and the decision not to make a futile request for a commutation-based extradition were reasonable and proper, the passage of time does not negate their reasonableness. The 1999 motion to dismiss considered all the appropriate factors and found that those two governmental decisions did not deny respondent his constitutional right to a speedy trial. The shocking murder in Canada was the primary cause of the delay. While jurists might disagree on the application of constitutional law to these facts, the standard of review on

appeal should have been abuse of discretion. *United States v. Munoz-Franco,* 487 F.3d 25, 58 (CA 1), *cert. denied,* ___ U.S. ___, 128 S.Ct. 678 (2007); *United States v. Williams*, 372 F.3d 96, 113 (CA 2 2004); *Green v. State,* 295 Ga. App. 468, 672 S.E.2d 414 (2008). Although the Appellate Division had interest of justice jurisdiction to dismiss this case without finding legal error under New York Criminal Procedure Law § 470.15(3), they chose not to exercise it. Instead they went further and declared the 1999 County Court decision to be erroneous as a matter of law. By agreeing, the New York State Court of Appeals compounded that unreasonable application of constitutional law. Respondent's conviction did not rest upon constitutional error.

Yet the New York State Court of Appeals has done more than find constitutional error where none exists. Their specific condemnation of the decisions to defer and to not make a futile request for a commutation-based extradition, even without an allegation of governmental bad faith, has created two corresponding legal duties that did not previously exist and which should be contrary to public policy.

If there is a duty not to defer, then multi-jurisdictional offenders will benefit from the territorial location of their widespread transgressions. The fact that respondent crossed back and forth over the Canadian border was a vagary of chance. The particular location of an international fugitive at the moment of arrest should not dictate the order of his

prosecutions and that determination cannot belong to the fugitive or his attorney.

If there is a duty to request Canada, or any foreign nation, to commute their murder in the first degree sentence and thereby devalue the memory of a murdered law enforcement officer, then the law is not only compelling a futile act, it is mandating a diplomatic insult. The New York State Court of Appeals should have focused on the entire scope of respondent's conduct and not just the murder indictment in New York. The two decisions found objectionable on appeal must be viewed in the context of proper international relations. This is the source of their reasonableness and it diminishes, if not negates, their significance as causes for the delay.

Respondent's conviction did not impinge upon the three core concerns underlying the constitutional right to a speedy trial. *Barker v. Wingo,* 407 U.S. at 532; *Smith v. Hooey,* 393 U.S. 374 (1969). The "prevention of oppressive pretrial incarceration" has no application to respondent since every single day of his custody has been based on the Canadian murder prosecution and ensuing conviction. *Doggett v. United States,* 509 U.S. at 660-661; *United States v. Loud Hawk,* 474 U.S. at 312; *United States v. Redd,* 2009 WL 348831 (CA 5 (Miss.)); *United States v. Brown,* 498 F.3d 523; *Castro v. Ward,* 138 F.3d 810. The New York detainer merely followed respondent and did not affect his liberty. The "anxiety and concern of the accused" is negligible here because, once in Canada, respondent's failure to initiate a transfer himself

under the other treaty belied any genuine concern about getting to trial in New York. *United States v. McGhee,* 532 F.3d 733 (CA 8 2008); *Hakeem v. Beyer*, 990 F.2d at 762 (must go beyond general anxiety inevitable in any criminal case). Although respondent had no duty to arrange for his trial in New York, his failure to use that opportunity is relevant when balancing the competing interests underlying the constitutional right to a speedy trial. *New York v. Hill,* 528 U.S. 110 (2000). Finally, as for "limiting the possibility of impairment to the defense," the New York Court of Appeals found that respondent's mental issues could not be adequately explored twenty years after the fact. The only support in the record for this conclusion was that respondent sought some type of psychological counseling after he was arrested. However, he thereafter stood trial in Canada and any records or witnesses available to raise a psychiatric defense could have been utilized and preserved by testimony at that time. While we reject the viability of such a defense, we categorically deny that the passage of time impaired respondent's defense to the New York indictment. *United States v. Hall,* 551 F.3d 257. Indeed he was able to plea bargain down to manslaughter with concurrent time. *Gray v. King,* 724 F.2d 1199 (CA 5), *cert. denied*, 469 U.S. 980 (1984).

While the federal constitutional right to a speedy trial can be waived by a voluntary and intelligent guilty plea in most jurisdictions, *Barker v. Wingo,* 407 U.S. 515; *Murphy v. State,* ___ S.W.3d ___, 2009 WL 279513, the New York State Court of Appeals has held that this right is unwaivable. *People v. Lopez,* 6

N.Y.3d 248 (2006); *People v. Blakely,* 34 N.Y.2d 311 (1974). Nonetheless, the plea and allocution speak eloquently about what really happened in this case. Respondent's conviction in New York was just and it should have been the final result. Although it took nineteen years to do it, this case was never about contesting guilt.[4]

This case transcends the actual guilt of respondent or the particular disposition of his case. *People v. Prosser,* 309 N.Y. 353 (1955). For the honor of both men killed by respondent, the 2005 extradition was done so respondent could admit his guilt and voice his contrition in a Suffolk County courtroom. The appellate decisions that refused to find this worthwhile must not remain undisturbed. On these facts, there was no violation of the federal constitutional right to a speedy trial and the New York State Court of Appeals decision is in conflict with how other jurisdictions have balanced the requisite factors under federal law.

Thus, certiorari on this case is important and not just to correct error. After reestablishing that reason for delay must involve apportioning blame for the delay between respondent and the government, this Court can also protect the discretionary executive

---

[4] At oral argument, New York State Court of Appeals Judge Pigott inquired whether the presumption of innocence helped respondent on appeal from the reversal of his conviction. However, the intermediate appellate reversal of respondent's conviction did not revive the government's preconviction burden of proof at a trial. *See Herrera v. Collins,* 506 U.S. 390, 399 (1993); *Delo v. Lashley,* 507 U.S. 272, 278 (1993).

authority to decide who should be first to prosecute a multi-jurisdictional offender. This Court can restore the relevance of foreign criminal prosecutions to questions of international extradition. The Court can also highlight the importance of updating our extradition treaties in a world where criminals view international borders as valuable barriers to criminal prosecution.

CONCLUSION

FOR THE REASONS STATED ABOVE, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED AND THIS COURT SHOULD ORDER BRIEFING AND ORAL ARGUMENT

Respectfully submitted,

STEVEN A. HOVANI*
Of Counsel to
THOMAS J. SPOTA
DISTRICT ATTORNEY OF
SUFFOLK COUNTY
Criminal Courts Building
200 Center Drive
Riverhead, New York 11901
(631) 852-2463

MICHAEL BLAKEY
ASSISTANT DISTRICT ATTORNEY
On the Brief

**Counsel of Record for Petitioner*

Dated: April 24, 2009
Riverhead, New York

___ N.E.2d ___, 2009 WL 321009 (N.Y.), 2009 N.Y. Slip Op. 01017

THIS DECISION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS.

Court of Appeals of New York.
The PEOPLE, etc., Appellant,
v.
Anthony **ROMEO**, Respondent.
Feb. 11, 2009.

Michael Blakey, for appellant.

Barry A. Bohrer, for respondent.

CIPARICK, Acting Chief Judge.

The question raised by this appeal is whether the People's lengthy post-indictment delay occasioned by delaying their prosecution in favor of a Canadian prosecution violated defendant's constitutional right to a speedy trial. Applying the five-factor speedy trial analysis articulated in *People v. Taranovich* (37 N.Y.2d 442 [1975]), we conclude that it did and therefore affirm.

I

In November 1985, a fatal shooting occurred in the victim's Fire Island home, in Suffolk County. Ballistics evidence taken over a year later indicated that a gun belonging to defendant was the murder weapon. In February 1987, Suffolk County Court ordered defendant to provide a DNA sample to

compare with DNA obtained from hair the victim had in his hand when he died. Defendant's attorney scheduled a date for his client to surrender to Suffolk County law enforcement officials and to provide a sample of his DNA for comparative testing.

On the scheduled date, March 5, defendant, armed with a gun, absconded to Canada in his car. On March 8, a Canadian constable pulled the car over for speeding. Defendant pulled his gun, and shot and killed the officer. He then discarded the firearm and reentered the United States, making his way to Boston, where he was arrested at Logan International Airport while attempting to board a plane to Florida. He was arraigned on the Canadian warrant before a federal magistrate and held without bail pending extradition to Canada. Pursuant to court order, Suffolk County law enforcement authorities came to Boston and obtained hair and blood samples from defendant that matched the hair strands found in the victim's hand.

On March 27, a Suffolk County grand jury indicted defendant on two counts of murder in the second degree (Penal Law §§ 125.25[1], 125.25[2]) and the People filed a warrant to detain him in the United States. On April 1, while defendant was still in federal custody, he made the first of a series of formal demands to the People for an immediate arraignment and trial on the Suffolk County indictment. He made a similar demand to the United States Department of Justice, asserting his constitutional right to a speedy trial.

On May 15, a Canadian official wrote a letter to the Suffolk County District Attorney's Office stating options available under the existing extradition treaty between the United States and Canada that would enable defendant's return to the United States after a Canadian conviction. The letter was encouraging in tone, but did not offer assurance that a prompt return would be arranged.

On May 29, defendant, still in federal custody, but now in Missouri, filed an order to show cause in Suffolk County Court demanding a writ of habeas corpus to be produced for arraignment in Suffolk County before his extradition to Canada. The People argued that defendant would suffer no unusual delay in facing trial in Suffolk County by being tried in Canada first-apparently under the mistaken belief that defendant would immediately be brought back to Suffolk County after his trial in Canada. On June 17, Suffolk County Court denied defendant's application, holding that the People could defer prosecution on the Suffolk County murder charges. The court cautioned the People, however, that any delay caused by allowing the Canadian prosecution to proceed first could result in a violation of defendant's rights to a speedy trial, redress for which defendant would be free to pursue at a later time.

The People still elected to defer prosecution. Defendant was extradited to Canada, where he was tried and convicted of the constable's murder. He received a sentence of imprisonment of twenty-five

years to life with parole eligibility in 2011. The People never sought extradition to Suffolk County.

On July 23, 1999, twelve years after having been indicted for the Fire Island murder, defendant moved in Suffolk County Court to dismiss the murder indictment on constitutional and statutory speedy trial grounds. The court denied the application. Six years later, in November 2005, defendant was brought back to Suffolk County following amendments to the Canadian-United States Extradition Treaty that allowed for the "borrowing" of defendant from Canada. Defendant was arraigned on the Suffolk County indictment and, in February 2006, entered a guilty plea to manslaughter in the first degree and was sentenced to a term of imprisonment of seven to twenty-one years to be served concurrently with the Canadian sentence. Defendant appealed, asserting that the nineteen-year post-indictment delay deprived him of his constitutional right to a speedy trial.

The Appellate Division reversed the conviction and dismissed the indictment, holding that the People's delay violated defendant's right to a speedy trial. The court took into consideration only the twelve-year delay in prosecution, from 1987 until 1999, when defendant filed his speedy trial motion. The Appellate Division reasoned that the People's decision to defer their prosecution in favor of the Canadian prosecution and failure to make an extradition request to Canada, even though it was unclear that Canada would have denied the request, caused

the extended delay in prosecution. A Judge of this Court granted the People leave to appeal and we now affirm.

II

A criminal defendant's right to a speedy trial is guaranteed both by the Sixth Amendment to the United States Constitution (U.S. Const, 6th, 14th Amends) and by statute (CPL 30.20; Civil Rights Law, § 12). Violation of this right results in dismissal of an indictment (*see Strunk v. United States,* 412 U.S. 434, 439-440 [1973]); *People v. Taranovich,* 37 N.Y.2d 442, 444 [1975]).

The term "speedy trial" must be evaluated in the context of a sensitive balancing of several factors, with no one factor being dispositive of a violation, and with no formalistic precepts by which a deprivation of the right can be assessed (*see Doggett v. United States,* 505 U.S. 647, 651 [1992]; *Taranovich,* 37 N.Y.2d at 444-445, 373 N.Y.S.2d 79, 335 N.E.2d 303). The five factors to be considered are: (1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charges; (4) any extended period of pretrial incarceration; and (5) any impairment of defendant's defense (*see Taranovich,* 37 N.Y.2d at 445, 373 N.Y.S.2d 79, 335 N.E.2d 303). The balancing of these factors must be performed carefully in light of the particular facts in each case (*see People v. Vernace,* 96 N.Y.2d 886, 887 [2001]).

The first factor, the extent of the delay, is of critical importance because "all other factors being equal, the greater the delay the more probable it is that the accused will be harmed thereby" (*Taranovich,* 37 N.Y.2d at 445, 373 N.Y.S.2d 79, 335 N.E.2d 303). There is no specific temporal period by which a delay may be evaluated or considered "presumptively prejudicial" (*see Doggett,* 505 U.S. at 652). Where the delay is lengthy, an examination of the other factors is triggered, and the length of delay becomes one factor in that inquiry (*see id.*).

Here, the delay between the indictment and the filing of the speedy trial motion was an extraordinary period of twelve years (*see Doggett,* 505 U.S. at 658 [8 1/2-year delay was "extraordinary"] [internal quotation omitted]; *Barker v. Wingo,* 407 U.S. 514, 533 [1972] [5 1/2-year delay was "extraordinary"]) *People v. White,* 32 N.Y.2d 393, 398 [1973] [4-year delay violated the defendant's right to a speedy trial]; *People v. Winfrey,* 20 N.Y.2d 138 [1967] [4 1/2-year delay]. Although not in itself decisive, the twelve-year delay requires close scrutiny of the other factors, especially the question of why the delay occurred. It was the People's burden to bring defendant to trial in a timely fashion (*see Smith v. Hooey,* 393 U.S. 374, 383 [1969]). The genesis of this extraordinary delay was the People's decision to defer their prosecution, allowing defendant to be sent abroad for a foreign murder prosecution, and then failing to make an extradition request to Canadian authorities, which, if granted, might have mitigated the length of the delay.

Soon after the filing of this indictment, defendant made repeated demands to be arraigned in Suffolk County before being sent to Canada. Additionally, during a hearing to determine whether defendant could be prosecuted in Canada first, Suffolk County Court cautioned the People that their decision might cause a speedy trial violation. Thus, even prior to their decision to defer prosecution, the People had been placed on notice that their decision might violate defendant's constitutional speedy trial rights, as defendant was already making claims that he was being prejudiced by the delay. In the face of these warnings, the People still allowed defendant to be prosecuted abroad before even arraigning him on the Suffolk County murder indictment.

The People argue that the correspondence they received from Canadian officials justified their decision to defer prosecution and the ensuing lengthy delay. Defendant does not suggest that the People acted with bad-faith, which obviously would weigh heavily in favor of dismissal of the indictment (*see Doggett,* 505 U.S. at 656). But even if acting under the mistaken belief that defendant's presence could be obtained in Suffolk County promptly after the Canadian trial, the People still knew or should have known that there was no guarantee that defendant would be brought back to Suffolk County in a timely manner. They were advised that the extradition treaty in effect would have enabled the People to request defendant's extradition, which the Canadian authorities had the discretion to grant or defer until

the completion of defendant's sentence. The People were required to, at the very minimum, make such a request for defendant's return. By deferring prosecution and choosing not to attempt to extradite defendant, the People ran the risk of a speedy trial violation.

The fact that a defendant is incarcerated outside of the state makes it incumbent upon the People to make diligent, good faith efforts to secure his presence in the state for arraignment and trial (*see Hooey,* 393 U.S. 374, 383 [1969]). Where the defendant is incarcerated in another country, failing to make an extradition request has been one factor that courts have viewed as evidencing a lack of diligent efforts on the part of the prosecution in bringing defendant to trial promptly (*see United States v. Pomeroy,* 822 F.2d 718, 721-722 [8th Cir1987]; *United States v. McConahy,* 505 F.2d 770, 773-774 [7th Cir1974]). Of course, where the foreign country demonstrates its clear intention to deny an extradition request, the People are under no obligation to make a futile gesture. But nothing in this record demonstrates that a request here would have been futile, and thus this case differs from cases where an extradition request would clearly fall on deaf ears (*see United States v. Blanco,* 861 F.2d 773, 778 [2d Cir1988] [Colombian government repeatedly refused to extradite Colombian nationals]; *United States v. Walton,* 814 F.2d 376, 379 [7th Cir1987] [Swedish officials denied informal requests from the United States State Department to extradite the suspect]). An extradition

request might have led to cooperation in securing defendant's return to Suffolk County (*see Pomeroy*, 822 F.2d at 721-722 [because it was at least possible that Canada would have honored an extradition request, the prosecution's failure to make an extradition request evidenced a lack of diligent efforts to secure the defendant]).

The third factor applies to the underlying charges. Although this case involves the grave offense of murder, the level of offense does not trump a defendant's right to a speedy trial. As we stated in *Taranovich:*

> "Of course, this is not to say that one's right to a speedy trial is dependent upon what one is charged with, but rather that the prosecutor may understandably be more thorough and precise in his preparation for the trial of a class C felony than he would be in prosecuting a misdemeanor" (37 N.Y.2d at 446, 373 N.Y.S.2d 79, 335 N.E.2d 303).

Here, the People do not claim that any delay was a result of time needed for pre-trial preparation. The 12-19 year delay is entirely the result of defendant's incarceration in Canada.

The fourth factor, whether there has been an extended period of pretrial incarceration, is not significant in this case. Defendant was initially detained on a warrant filed by the Canadian government. He has been held at all times thereafter pursuant to the Canadian charges, never on the Suffolk

County indictment alone. At no point during his prosecution on the Suffolk County charges has he faced additional incarceration from those charges.

The fifth factor is whether or not there is any indication that the defense has been impaired by reason of the delay, such as difficulty in gathering evidence and locating witnesses (*see Barker*, 407 U.S. at 532). Such concerns are exacerbated where the defendant is incarcerated in a foreign jurisdiction.

Here, it is highly likely that the defense was "impaired" (*see Hooey*, 393 U.S. at 374) by defendant's incarceration for many years in a foreign prison where it would have been difficult for him to participate in his own defense, confer with counsel and contact witnesses. Defendant claims that he had psychiatric problems and might have presented a defense based on a lack of criminal responsibility by reason of mental disease or defect. This type of defense would have required defendant to establish his mental incapacity at the time of the offense. The ability to do this was clearly hampered by his incarceration abroad.

We conclude that the Appellate Division properly balanced the *Taranovich* factors and that the prejudice caused by the post-indictment delay, as a result of the People's decision to allow defendant to be tried in Canada first and the subsequent decision not to seek defendant's extradition to Suffolk County, violated defendant's constitutional right to a speedy trial.

Accordingly, the order of the Appellate Division should be affirmed.

Order affirmed.

Judges GRAFFEO, READ, SMITH, PIGOTT and JONES concur.

47 A.D.3d 954, 849 N.Y.S.2d 666

Supreme Court, Appellate Division,
Second Department, New York.
The PEOPLE, etc., respondent,
v.
Anthony ROMEO, appellant.
Jan. 29, 2008.

Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C., New York, N.Y. (Barry A. Bohrer of counsel), for appellant.

Thomas J. Spota, District Attorney, Riverhead, N.Y. (Michael Blakey of counsel; Stephen Miller on the brief), for respondent.

STEPHEN G. CRANE, J.P., REINALDO E. RIVERA, ANITA R. FLORIO, and RUTH C. BALKIN, JJ.

Appeal by the defendant from a judgment of the County Court, Suffolk County (Kahn, J.), rendered February 16, 2006, convicting him of manslaughter in the first degree, upon his plea of guilty, and imposing sentence.

ORDERED that the judgment is reversed, on the law, the indictment is dismissed, and the matter is remitted to the County Court, Suffolk County, for the purpose of entering an order in its discretion pursuant to CPL 160.50.

In November 1985 the defendant killed John Starkey in Suffolk County (hereinafter the Starkey

homicide). During the course of the People's investigation of this homicide, the County Court issued an order that the defendant provide blood and hair samples. The defendant's attorney arranged that the defendant would surrender on March 5, 1987. Instead of surrendering, the defendant fled to Canada, where, on March 8, 1987, he killed a New Brunswick constable. The defendant recrossed the border into the United States and was arrested in Boston for that crime. On March 9, 1987, he appeared before a federal magistrate, who ordered that he be held without bail pending extradition to Canada. Suffolk County law enforcement officials, who were made aware of the defendant's presence in the United States, obtained blood and hair samples from him while he was incarcerated in Boston. Within a week, testing of those samples linked the defendant to the Starkey homicide. In that same month, March 1987, a grand jury in Suffolk County returned an indictment charging the defendant with two counts of murder in the second degree in connection with the Starkey homicide, and an arrest warrant and a detainer were issued.

In March and April 1987, while the defendant remained in federal custody, hearings were held on the Canadian extradition request, and the People agreed to permit the Canadian case to be tried first. The defendant, through counsel, objected, and asserted the defendant's constitutional right to a speedy trial. In May 1987, the defendant, who was then in federal custody in Springfield, Missouri, moved for an

order directing the People to obtain the defendant's presence in Suffolk County for arraignment. At the oral argument on the motion, the People, in opposing the motion, argued in part that they believed the Canadian trial would not affect or delay the timing of the ultimate trial date under the Suffolk County indictment for the Starkey homicide.

By order dated June 17, 1987, more than three months after the defendant had been taken into federal custody, the County Court denied his motion. The court noted that the People's decision to defer its prosecution of the Starkey homicide might implicate the defendant's speedy trial rights: "[i]n the event that this procedure results in the violation of the defendant's right to a speedy trial he may seek the ultimate remedy of dismissal at the appropriate time and in the appropriate manner." At oral argument on the motion on June 15, 1987 the County Court had characterized the People's strategy as "one that they will have to live with." The defendant was extradited to Canada in 1987, convicted of the constable's murder, and sentenced to an indeterminate term of 25 years to life imprisonment. The People did not seek to extradite the defendant from Canada after his conviction and sentencing in 1987.

In July 1999, while incarcerated in Canada, the defendant moved in the County Court, Suffolk County, to dismiss the Starkey indictment on constitutional and statutory (*see* CPL 30.20) speedy trial grounds. The People argued in opposition, as they do now, that under the extradition treaty between the United

States and Canada (*see* Treaty on Extradition Between the United States of America & Canada, 27 UST 983, TIAS No. 8237 [1971]), it would have been futile to seek extradition because it would have required the Canadian authorities to commute the defendant's sentence on his conviction for the murder of the constable. The motion was denied in December 1999.

On April 30, 2003, an amendment to the extradition treaty became effective and, on June 3, 2003, the People sought extradition of the defendant. In November 2005, upon the defendant's return to the United States, he was finally arraigned on the Suffolk County indictment. In February, 2006 the defendant pleaded guilty to manslaughter in the first degree pursuant to the Suffolk County indictment and was sentenced to an indeterminate term of 7 to 21 years imprisonment with respect to the Starkey homicide, to run concurrently with the term imposed upon his Canadian conviction. During the 2005 and 2006 proceedings in the County Court, Suffolk County, the defendant did not renew or reassert his constitutional speedy trial claim. As part of his allocution to the guilty plea to manslaughter in the first degree, he expressly waived his right to appeal his "plea and sentence as well as any prior rulings that remain in the case."

After the defendant was sentenced in Suffolk County, he was returned to Canada to continue serving the sentence imposed in connection with the

constable's murder and the concurrent sentence on the Starkey homicide.

The defendant now appeals his conviction for the Starkey homicide, arguing that his constitutional right to a speedy trial has been violated.

The People's claim that the defendant's "failure to file a motion to dismiss the indictment in 2005 or 2006 constitutes nonpreservation" of his constitutional speedy trial claim is without merit. The defendant's claim is "not procedurally barred since constitutional speedy trial claims survive both a plea of guilty and an otherwise efficacious waiver of appellate review" (*People v. Love,* 236 A.D.2d 488, 489, 654 N.Y.S.2d 149; *see People v. Seaberg,* 74 N.Y.2d 1, 9, 543 N.Y.S.2d 968, 541 N.E.2d 1022). "[A] defendant who initially interposes a constitutional speedy trial claim but subsequently abandons it *before a determination on the claim is made,* cannot subsequently raise that claim on appeal" (*People v. Sutton,* 80 N.Y.2d 273, 282, 590 N.Y.S.2d 46, 604 N.E.2d 108 [emphasis added]). Here, however, the defendant's 1999 constitutional speedy trial motion was, in fact, decided by the County Court in 1999. The defendant was, thus, not required to reassert this claim when he pleaded guilty in 2006 (*cf. People v. Love,* 236 A.D.2d at 489, 654 N.Y.S.2d 149). Nor could the defendant's waiver of the right to appeal encompass the claim (*see People v. Sutton,* 80 N.Y.2d at 281-282, 590 N.Y.S.2d 46, 604 N.E.2d 108; *People v. Allen,* 86 N.Y.2d 599, 602, 635 N.Y.S.2d 139, 658 N.E.2d 1012; *People v.*

Seaberg, 74 N.Y.2d at 9, 543 N.Y.S.2d 968, 541 N.E.2d 1022).

On the merits, in evaluating a speedy trial claim under the United States Constitutions [sic], we must consider the extent of the delay, the reason for it, the nature of the underlying charge, whether there has been an extended period of pretrial incarceration, and whether there is any indication that the defense has been prejudiced by the delay (*see People v. Taranovich,* 37 N.Y.2d 442, 445, 373 N.Y.S.2d 79, 335 N.E.2d 303; *cf. People v. Vernace,* 96 N.Y.2d 886, 887, 730 N.Y.S.2d 778, 756 N.E.2d 66).

The defendant's constitutional speedy trial claim must be evaluated in light of the delay as of the time the defendant made his speedy trial motion in 1999 (*see People v. Love,* 236 A.D.2d at 488-489, 654 N.Y.S.2d 149). We agree with the defendant that he was denied his constitutional right to a speedy trial (*see* U.S. Const., 6th, 14th Amends).

Here, the delay we consider is the 12 years from 1987 to 1999. That lengthy period is extraordinary (*see Doggett v. United States,* 505 U.S. 647, 657, 112 S.Ct. 2686, 120 L.Ed.2d 520; *Barker v. Wingo,* 407 U.S. 514, 533, 92 S.Ct. 2182, 33 L.Ed.2d 101). Indeed, the People do not dispute that the defendant need not demonstrate prejudice in light of this extensive period of delay, arguing only that they were prejudiced as well. Additionally, the reason for the delay was the People's decision to defer prosecution in favor of the Canadian prosecution, despite

the defendant's presence in this country. That the People may have mistakenly believed that they would be able to obtain the defendant's presence after the Canadian trial was completed is unavailing, especially in light of the facts that the extradition provisions in effect before the defendant was extradited to Canada were the same as those in effect during the entire 12-year period of delay, and the People did not request extradition (*see United States v. Pomeroy,* 822 F.2d 718, 721-722 [8th Cir.]; *United States v. McConahy,* 505 F.2d 770 [7th Cir.]; *People v. McLaurin,* 38 N.Y.2d 123, 126, 378 N.Y.S.2d 692, 341 N.E.2d 250; *People v. Winfrey,* 20 N.Y.2d 138, 141-142, 281 N.Y.S.2d 823, 228 N.E.2d 808). Two of the *Taranovich* factors (*see People v. Taranovich,* 37 N.Y.2d 442, 373 N.Y.S.2d 79, 335 N.E.2d 303) militate in favor of the People's position. The seriousness of the charges in connection with the Starkey homicide is self-evident, and the defendant was not incarcerated before trial on those charges at all. Nevertheless, under the circumstances of this case, we find that the length of the delay, the prejudice to the defendant, and the People's responsibility for the delay-despite having been aware before the defendant was extradited to Canada that he was asserting his constitutional right to a speedy trial-outweigh the other factors. The defendant was denied his constitutional right to a speedy trial.

MEMORANDUM

COUNTY COURT,
SUFFOLK COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

ANTHONY ROMEO,

Defendant.

By: HON. JOEL L. LEFKOWITZ
Judge of the County Court
Case No.: 392-87

HON. JAMES M. CATTERSON, JR.
District Attorney
Of Suffolk County
by: Steven A. Hovani, Esq.
Criminal Courts Building
200 Center Drive
Riverhead, New York
11901

STEPHEN P. SCARING, ESQ.
Attorney for Defendant
Suite 501
666 Old Country Road
Garden City, New York
11530-2004

The defendant Anthony Romeo, is charged with two counts of Murder in the Second Degree. He moves for an order dismissing the indictment on the grounds that he has been deprived of his constitutional due process rights and statutory right to a speedy trial. The People oppose on the ground that a demand for extradition would have been futile due to the unique circumstances of this case.

The following facts are not in dispute. The defendant was indicted on March 27, 1987, by a Grand

Jury in Suffolk County, New York and charged with two counts of Murder in the Second Degree. The indictment charged the defendant with the shooting death of John Starkey between November 2, 1985 and November 8, 1985. In the early part of 1987, prior to the indictment, Suffolk County Court Judge Thomas Mallon issued an order granting the request of the Suffolk County District Attorney to obtain hair and blood samples from the defendant in connection with the shooting death of John Starkey.

However, prior to the time he was to provide the samples, the defendant fled. While attempting to cross the border into Canada the defendant shot and killed a highway patrol officer in New Brunswick, Canada. The defendant again crossed the border and was eventually arrested in Boston, Massachusetts on that murder. While the defendant was in federal custody, the Suffolk County authorities obtained the defendant's hair and blood samples. On March 18, 1987, it was determined that the defendant's samples were consistent with the evidence recovered at the Starkey murder. The defendant was then indicted for that murder on March 27, 1987.

A hearing was held on Canada's extradition request on March 31, 1987 and April 28, 1987, before Magistrate Collins who ordered that the defendant be extradited to Canada. He remained in Boston pending an appeal on the extradition order.

The defendant then moved for an order in the Suffolk County Court (Tisch, J.), directing the Suffolk

County District Attorney to apply for the defendant's production for arraignment pursuant to CPL 580.30. The People opposed on the ground that they were deferring prosecution until the conclusion of the Canadian proceeding. On June 17, 1987, the Court determined that the People's position to defer the Suffolk murder prosecution until the conclusion of the Canadian proceeding was neither arbitrary nor unreasonable.

The appeal of the extradition order was denied and the defendant was extradited to Canada. After trial and conviction, he was sentenced to a term of imprisonment of twenty-five years to life. He is eligible for parole in 2002.

A defendant's right to a speedy trial is guaranteed by both the United States Constitution, New York Constitution and statute. *People v. Taranovich* (37 NY 2d 442), listed the criteria to be considered in reaching a determination. They are: (1) the length of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) the extent of pretrial incarceration; and (5) whether the defendant was prejudiced by the delay. In *Barker v. Wingo* (407 U.S. 514), the Supreme Court included as a factor whether the defendant had asserted a speedy trial right.

The length of the delay is not in dispute. The parties agree that in excess of twelve years has passed. The issue presented is whether there is justification for the delay.

As the people note, the Extradition Treaty between the United States and Canada provides that Canada is not required to consent to the extradition of an individual serving a prison term there until that sentence is completed. The Canadian Extradition Act limits any discretion in the treaty by refusing surrender of a fugitive to the United States until the Canadian sentence has expired. Therefore, as the People argue, any extradition request would have been futile since a return of the defendant by Canada would have required them to commute his sentence there.

The People also argue that the defendant was under the unique position of effecting his own return under the Canada-United States Prisoner Transfer Treaty. Under this treaty the defendant could have applied for permission to serve the remainder of his Canadian sentence in a United States prison. Once in the United States, the defendant then could have demanded trial within the 180 day statutory limit specified in the Interstate Agreement on Detainers. It is possible that such request would also have been futile. However, such procedure was only available to the defendant. It was not available to Suffolk authorities.

These factors also belie the defendant's claim that the People's failure to seek extradition was motivated by their desire to gain a tactical advantage and prejudice the defendant.

Finally, pursuant to CPL 30.30(3)(a), statutory speedy trial considerations do not apply to a murder charge.

Therefore, the defendant's motion to dismiss the indictment is denied.

The foregoing shall constitute the decision and order of this Court.

ENTER.

Dated: December 7, 1999

/s/ Joel L. Lefkowitz
HON. JOEL L. LEFKOWITZ
Judge of the County Court

T.I.A.S. No. 8237, 27 U.S.T. 983,
1976 WL 166697 (U.S. Treaty)

UNITED STATES OF AMERICA
Canada

Extradition

Treaty signed at Washington December 3, 1971;

And agreement amending the treaty

Effected by exchange of notes

Signed at Washington June 28 and July 9, 1974;

Ratification of the treaty, as amended,
advised by the Senate of the United States
of America December 1, 1975;

Ratified by the President of the United States of
America December 12, 1975;

Ratified by Canada February 2, 1976;

Ratifications exchanged at Ottawa March 22, 1976;

Proclaimed by the President of the
United States of America May 6, 1976;

Entered into force March 22, 1976.

BY THE PRESIDENT OF THE
UNITED STATES OF AMERICA

A PROCLAMATION

*1 CONSIDERING THAT:

The Treaty on Extradition between the United States of America and Canada was signed at Washington on December 3, 1971, as amended by an exchange of

notes on June 28 and July 9, 1974, the original of which Treaty, as amended, is hereto annexed;

The Senate of the United States of America by its resolution of December 1, 1975, two-thirds of the Senators present concurring therein, gave its advice and consent to ratification of the Treaty, as amended;

The Treaty was ratified by the President of the United States of America on December 12, 1975, in pursuance of the advice and consent of the Senate, and has been duly ratified on the part of Canada;

The respective instruments of ratification were exchanged at Ottawa on March 22, 1976;

It is provided in Article 18 of the Treaty that the Treaty shall enter into force upon the exchange of ratifications;

Now, THEREFORE, I, Gerald R. Ford, President of the United States of America, proclaim and make public the Treaty, as amended, to the end that it shall be observed and fulfilled with good faith on and after March 22, 1976, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this sixth day of May in the year of our Lord one thousand nine

hundred seventy-six and of the Independence of the United States of America the two hundredth.

GERALD R. FORD
[SEAL]

By the President:

JOSEPH JOHN SISCO

Acting Secretary of State

TREATY ON EXTRADITION BETWEEN THE UNITED STATES OF AMERICA AND CANADA

The United States of America and Canada, desiring to make more effective the cooperation of the two countries in the repression of crime by making provision for the reciprocal extradition of offenders, agree as follows:

ARTICLE 1

Each Contracting Party agrees to extradite to the other, in the circumstances and subject to the conditions described in this Treaty, persons found in its territory who have been charged with, or convicted of, any of the offenses covered by Article 2 of this Treaty committed within the territory of the other, or outside thereof under the conditions specified in Article 3(3) of this Treaty.

ARTICLE 2

(1) Persons shall be delivered up according to the provisions of this Treaty for any of the offenses listed in the Schedule annexed to this Treaty, which is an

integral part of this Treaty, provided these offenses are punishable by the laws of both Contracting Parties by a term of imprisonment exceeding one year.

(2) Extradition shall also be granted for attempts to commit, or conspiracy to commit or being a party to any of the offenses listed in the annexed Schedule.

(3) Extradition shall also be granted for any offense against a federal law of the United States in which one of the offenses listed in the annexed Schedule, or made extraditable by paragraph (2) of this Article, is a substantial element, even if transporting, transportation, the use of the mails or interstate facilities are also elements of the specific offense.

ARTICLE 3

*2 (1) For the purpose of this Treaty the territory of a Contracting Party shall include all territory under the jurisdiction of that Contracting Party, including air space and territorial waters and vessels and aircraft registered in that Contracting Party or aircraft leased without crew to a lessee who has his principal place of business, or, if the lessee has no such place of business, his permanent residence in, that Contracting Party if any such aircraft is in flight, or if any such vessel is on the high seas when the offense is committed. For the purposes of this Treaty an aircraft shall be considered in flight from the moment when power is applied for the purpose of the take-off until the moment when the landing run ends.

(2) In a case when offense 23 of the annexed Schedule is committed on board an aircraft at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation, such offense and any other offense covered by Article 2 committed against passengers or crew of that aircraft in connection with such offense shall be considered to have been committed within the territory of a Contracting Party if the aircraft was registered in that Contracting Party, if the aircraft landed in the territory of that Contracting Party with the alleged offender still on board, or if the aircraft was leased without crew to a lessee who has his principal place of business, or, if the lessee has no such place of business, his permanent residence in that Contracting Party.

(3) When the offense for which extradition has been requested has been committed outside the territory of the requesting State, the executive or other appropriate authority of the requested State shall have the power to grant the extradition if the laws of the requested State provide for jurisdiction over such an offense committed in similar circumstances.

ARTICLE 4

(1) Extradition shall not be granted in any of the following circumstances:

(i) When the person whose surrender is sought is being proceeded against, or has been tried and discharged or punished in the territory of the requested

State for the offense for which his extradition is requested.

(ii) When the prosecution for the offense has become barred by lapse of time according to the laws of the requesting State.

(iii) When the offense in respect of which extradition is requested is of a political character, or the person whose extradition is requested proves that the extradition request has been made for the purpose of trying or punishing him for an offense of the above-mentioned character. If any question arises as to whether a case comes within the provisions of this subparagraph, the authorities of the Government on which the requisition is made shall decide.

(2) The provisions of subparagraph (iii) of paragraph (1) of this Article shall not be applicable to the following:

(i) A kidnapping, murder or other assault against the life or physical integrity of a person to whom a Contracting Party has the duty according to international law to give special protection, or any attempt to commit such an offense with respect to any such person.

*3 (ii) When offense 23 of the annexed Schedule, or an attempt to commit, or a conspiracy to commit, or being a party to the commission of that offense, has been committed on board an aircraft engaged in commercial services carrying passengers.

ARTICLE 5

If a request for extradition is made under this Treaty for a person who at the time of such request, or at the time of the commission of the offense for which extradition is sought, is under the age of eighteen years and is considered by the requested State to be one of its residents, the requested State, upon a determination that extradition would disrupt the social readjustment and rehabilitation of that person, may recommend to the requesting State that the request for extradition be withdrawn, specifying the reasons therefor.

ARTICLE 6

When the offense for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for that offense, extradition may be refused unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

ARTICLE 7

When the person whose extradition is requested is being proceeded against or is serving a sentence in the territory of the requested State for an offense other than that for which extradition has been requested, his surrender may be deferred until the conclusion of the proceedings and the full execution of

any punishment he may be or may have been awarded.

ARTICLE 8

The determination that extradition should or should not be granted shall be made in accordance with the law of the requested State and the person whose extradition is sought shall have the right to use all remedies and recourses provided by such law.

ARTICLE 9

(1) The request for extradition shall be made through the diplomatic channel.

(2) The request shall be accompanied by a description of the person sought, a statement of the facts of the case, the text of the laws of the requesting State describing the offense and prescribing the punishment for the offense, and a statement of the law relating to the limitation of the legal proceedings.

(3) When the request relates to a person who has not yet been convicted, it must also be accompanied by a warrant of arrest issued by a judge or other judicial officer of the requesting State and by such evidence as, according to the laws of the requested State, would justify his arrest and committal for trial if the offense had been committed there, including evidence proving the person requested is the person to whom the warrant of arrest refers.

(4) When the request relates to a person already convicted, it must be accompanied by the judgment of

conviction and sentence passed against him in the territory of the requesting State, by a statement showing how much of the sentence has not been served, and by evidence proving that the person requested is the person to whom the sentence refers.

ARTICLE 10

*4 (1) Extradition shall be granted only if the evidence be found sufficient, according to the laws of the place where the person sought shall be found, either to justify his committal for trial if the offense of which he is accused had been committed in its territory or to prove that he is the identical person convicted by the courts of the requesting State.

(2) The documentary evidence in support of a request for extradition or copies of these documents shall be admitted in evidence in the examination of the request for extradition when, in the case of a request emanating from Canada, they are authenticated by an officer of the Department of Justice of Canada and are certified by the principal diplomatic or consular officer of the United States in Canada, or when, in the case of a request emanating from the United States, they are authenticated by an officer of the Department of State of the United States and are certified by the principal diplomatic or consular officer of Canada in the United States.

ARTICLE 11

(1) In case of urgency a Contracting Party may apply for the provisional arrest of the person sought

pending the presentation of the request for extradition through the diplomatic channel. Such application shall contain a description of the person sought, an indication of intention to request the extradition of the person sought and a statement of the existence of a warrant of arrest or a judgment of conviction against that person, and such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed, or the person sought been convicted, in the territory of the requested State.

(2) On receipt of such an application the requested State shall take the necessary steps to secure the arrest of the person claimed.

(3) A person arrested shall be set at liberty upon the expiration of forty-five days from the date of his arrest pursuant to such application if a request for his extradition accompanied by the documents specified in Article 9 shall not have been received. This stipulation shall not prevent the institution of proceedings with a view to extraditing the person sought if the request is subsequently received.

ARTICLE 12

(1) A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting State for an offense other than that for which extradition has been granted nor be extradited by that State to a third State unless:

(i) He has left the territory of the requesting State after his extradition and has voluntarily returned to it;

(ii) He has not left the territory of the requesting State within thirty days after being free to do so; or

(iii) The requested State has consented to his detention, trial, punishment for an offense other than that for which extradition was granted or to his extradition to a third State, provided such other offense is covered by Article 2.

*5 (2) The foregoing shall not apply to offenses committed after the extradition.

ARTICLE 13

(1) A requested State upon receiving two or more requests for the extradition of the same person either for the same offense, or for different offenses, shall determine to which of the requesting States it will extradite the person sought.

(2) Among the matters which the requested State may take into consideration are the possibility of a later extradition between the requesting States, the seriousness of each offense, the place where the offense was committed, the dates upon which the requests were received and the provisions of any extradition agreements between the requested State and the other requesting State or States.

ARTICLE 14

(1) The requested State shall promptly communicate to the requesting State through the diplomatic channel the decision on the request for extradition.

(2) If a warrant or order for the extradition of a person sought has been issued by the competent authority and he is not removed from the territory of the requested State within such time as may be prescribed by the laws of that State, he may be set at liberty and the requested State may subsequently refuse to extradite that person for the same offense.

ARTICLE 15

(1) To the extent permitted under the law of the requested State and subject to the rights of third parties, which shall be duly respected, all articles acquired as a result of the offense or which may be required as evidence shall, if found, be surrendered to the requesting State if extradition is granted.

(2) Subject to the qualifications of paragraph (1) of this Article, the above-mentioned articles shall be returned to the requesting State even if the extradition, having been agreed to, cannot be carried out owing to the death or escape of the person sought.

ARTICLE 16

(1) The right to transport through the territory of one of the Contracting Parties a person surrendered to the other Contracting Party by a third State shall be granted on request made through the diplomatic

channel, provided that conditions are present which would warrant extradition of such person by the State of transit and reasons of public order are not opposed to the transit.

(2) The Party to which the person has been extradited shall reimburse the Party through whose territory such person is transported for any expenses incurred by the latter in connection with such transportation.

ARTICLE 17

(1) Expenses related to the transportation of the person sought to the requesting State shall be paid by the requesting State. The appropriate legal officers of the State in which the extradition proceedings take place shall, by all legal means within their power, assist the requesting State before the respective judges and magistrates.

(2) No pecuniary claim, arising out of the arrest, detention, examination and surrender of persons sought under the terms of this Treaty, shall be made by the requested State against the requesting State.

ARTICLE 18

*6 (1) This Treaty shall be ratified and the instruments of ratification shall be exchanged at Ottawa as soon as possible.

(2) This Treaty shall terminate and replace any extradition agreements and provisions on extradition in any other agreement in force between the United

States and Canada; except that the crimes listed in such agreements and committed prior to entry into force of this Treaty shall be subject to extradition pursuant to the provisions of such agreements.

(3) This Treaty shall enter into force upon the exchange of ratifications.[1] It may be terminated by either Contracting Party giving notice of termination to the other Contracting Party at any time and the termination shall be effective six months after the date of receipt of such notice.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed this Treaty.

DONE in duplicate, in the English and French languages, each language version being equally authentic, at Washington this third day of December, one thousand nine hundred seventy one.

FOR THE UNITED STATES OF AMERICA:
(Signature)

William P. Rogers

FOR CANADA:

(Signature)

Mitchell Sharp

---

[1] Mar. 22, 1976.

SCHEDULE

1. Murder; assault with intent to commit murder.

2. Manslaughter.

3. Wounding; maiming; or assault occasioning bodily harm.

4. Unlawful throwing or application of any corrosive substances at or upon the person of another.

5. Rape; indecent assault.

6. Unlawful sexual acts with or upon children under the age specified by the laws of both the requesting and requested States.

7. Willful nonsupport or willful abandonment of a minor when such minor is or is likely to be injured or his life is or is likely to be endangered.

8. Kidnapping; child stealing; abduction; false imprisonment.

9. Robbery; assault with intent to steal.

10. Burglary; housebreaking.

11. Larceny, theft or embezzlement.

12. Obtaining property, money or valuable securities by false pretenses or by threat of force or by defrauding the public or any person by deceit or falsehood or other fraudulent means, whether such deceit or falsehood or any fraudulent means would or would not amount to a false pretense.

13. Bribery, including soliciting, offering and accepting.

14. Extortion.

15. Receiving any money, valuable securities or other property knowing the same to have been unlawfully obtained.

16. Fraud by a banker, agent, or by a director or officer of any company.

17. Offenses against the laws relating to counterfeiting or forgery.

18. Perjury in any proceeding whatsoever.

19. Making a false affidavit or statutory declaration for any extrajudicial purpose.

20. Arson.

21. Any act done with intent to endanger the safety of any person travelling upon a railway, or in any aircraft or vessel or other means of transportation.

*7 22. Piracy, by statute or by law of nations; mutiny or revolt on board a vessel against the authority of the captain or commander of such vessel.

23. Any unlawful seizure or exercise of control of an aircraft, by force or violence or threat of force or violence, or by any other form of intimidation, on board such aircraft.

24. Willful injury to property.

25. Offenses against the bankruptcy laws.

26. Offenses against the laws relating to the traffic in, production, manufacture, or importation of narcotic drugs, Cannabis sativa L., hallucinogenic drugs, amphetamines, barbiturates, cocaine and its derivatives.

27. Use of the mails or other means of communication in connection with schemes devised or intended to deceive or defraud the public or for the purpose of obtaining money or property by false pretenses.

28. Offenses against federal laws relating to the sale or purchase of securities.

29. Making or having in possession any explosive substance with intent to endanger life, or to cause severe damage to property.

30. Obstructing the course of justice in a judicial proceeding, existing or proposed, by:

a) dissuading or attempting to dissuade a person by threats, bribes, or other corrupt means from giving evidence;

b) influencing or attempting to influence by threat, bribes, or other corrupt means a person in his conduct as a juror; or

c) accepting a bribe or other corrupt consideration to abstain from giving evidence or to do or to refrain from doing anything as a juror.

[AMENDING AGREEMENT]

The Canadian Ambassador to the Secretary of State

Washington, D.C.

June 28, 1974

No. 126

Excellency,

I have the honour to refer to the Treaty on Extradition between the Government of Canada and the Government of the United States signed at Washington on December 3, 1971 and to subsequent discussions between representatives of our two governments concerning the amendment of the said Treaty.

Further to those discussions I now have the honour to propose that the said Treaty be amended as follows:

> (1) That Article 4(2) (i) of the Treaty shall be amended to read: "A kidnapping, murder, or other assault against the life or physical integrity of a person to whom a Contracting Party has the duty according to international law to give special protection, or any attempt or conspiracy to commit, or being a party to

The Honourable

Henry A. Kissinger,

Secretary of State, Washington, D.C. 20520

> the commission of, such an offence with respect to any such person."

(2) That clause 26 of the Schedule annexed to the Treaty shall be amended to read: "Offences against the laws relating to the traffic in, production, manufacture or importation of drugs listed in Schedule I to the Single Convention on Narcotic Drugs of March 30, 1961[2] and of drugs listed in Schedules I, II and III to the Convention on Psychotropic Substances of February 21, 1971."

*8 If this proposal meets with the approval of your government, I have the further honour to propose that this Note, which is authentic in English and in French, and your reply shall constitute an amendment to the Treaty on Extradition between Canada and the United States referred to above, which shall come into force on the date of the entry into force of the said Treaty and which shall be considered an integral part of the said Treaty.

Accept, Excellency, the assurances of my highest consideration.

(Signature)

M. Cadieux,

Ambassador.

---

[2] TIAS 6298; 18 UST 1559.

French Text of the Canadian Note

The Secretary of State to the Canadian Ambassador

DEPARTMENT OF STATE WASHINGTON

July 9, 1974

Excellency:

I have the honor to refer to your note of June 28, 1974, in the English and French languages, relating to amendment of the Treaty on Extradition between the United States of America and Canada, signed at Washington December 3, 1971.

On behalf of the United States of America I confirm the understanding set forth therein and consider that your note and this reply constitute an agreement between the United States and Canada on this matter.

Accept, Excellency, the renewed assurances of my highest consideration.

For the Secretary of State:
Acting Secretary
(Signature)

His Excellency

Marcel Cadieux,
Ambassador of Canada.

PROTOCOL AMENDING THE TREATY ON EXTRADITION BETWEEN THE UNITED STATES OF AMERICA AND CANADA SIGNED AT WASHINGTON ON DECEMBER 3, 1971, AS AMENDED BY AN EXCHANGE OF NOTES ON JUNE 28 AND JULY 9, 1974

The Government of the United States of America and the Government of Canada;

Desiring to make more effective the Extradition Treaty between the Contracting Parties, signed at Washington on December 3, 1971, as amended by the agreement effected by an Exchange of Notes on June 28 and July 9, 1974 (hereinafter referred to as "the Extradition Treaty");

Have agreed as follows:

ARTICLE I

Article 2 of the Extradition Treaty is deleted and replaced by the following:

"ARTICLE 2

"(1) Extradition shall be granted for conduct which constitutes an offense punishable by the laws of both Contracting Parties by imprisonment or other form of detention for a term exceeding one year or any greater punishment.

"(2) An offense is extraditable notwithstanding

"(i) that conduct such as interstate transportation or use of the mails or of other facilities

affecting interstate or foreign commerce, required for the purpose of establishing jurisdiction, forms part of the offense in the United States, or

"(ii) that it relates to taxation or revenue or is one of a purely fiscal character."

ARTICLE II

The SCHEDULE to the Extradition Treaty, as amended, is deleted.

ARTICLE III

Paragraph (2) of Article 3 of the Extradition Treaty is deleted. Paragraph (3) of Article 3 of the Extradition Treaty is amended to read as follows:

"(2) When the offense for which extradition is requested was committed outside the territory of the requesting State, the executive or other appropriate authority of the requested State shall grant extradition if the laws of the requested State provide for jurisdiction over such an offense committed in similar circumstances. If the laws in the requested State do not so provide, the executive authority in the requested State may, in its discretion, grant extradition."

ARTICLE IV

Paragraph (2) of Article 4 of the Extradition Treaty, as amended, is deleted and replaced by the following:

"(2) For the purpose of this Treaty, the following offenses shall be deemed not to be offenses within subparagraph (iii) of paragraph 1 of this Article:

"(i) An offense for which each Contracting Party has the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to its competent authorities for the purpose of prosecution;

"(ii) Murder, manslaughter or other culpable homicide, malicious wounding or inflicting grievous bodily harm;

"(iii) An offense involving kidnapping, abduction, or any form of unlawful detention, including taking a hostage;

"(iv) An offense involving the placing or use of explosives, incendiaries or destructive devices or substances capable of endangering life or of causing grievous bodily harm or substantial property damage; and

"(v) An attempt or conspiracy to commit, or counseling the commission of, any of the foregoing offenses, or aiding or abetting a person who commits or attempts to commit such offenses."

ARTICLE V

Article 7 of the Extradition Treaty is deleted and replaced by the following:

"ARTICLE 7

"When the person sought is being proceeded against or is serving a sentence in the requested State for an offense other than that for which extradition is requested, the requested State may surrender the person sought or postpone surrender until the conclusion of the proceedings or the service of the whole or any part of the sentence imposed."

ARTICLE VI

Paragraph (3) of Article 11 of the Extradition Treaty is deleted and replaced by the following:

"(3) A person arrested shall be set at liberty upon the expiration of sixty days from the date of arrest pursuant to such application if a request for extradition and the documents specified in Article 9 have not been received. This stipulation shall not prevent the institution of proceedings with a view to extraditing the person sought if the request and documents are subsequently received."

ARTICLE VII

The Extradition Treaty is amended by adding the following after Article 17:

"ARTICLE 17 BIS

"If both contracting Parties have jurisdiction to prosecute the person for the offense for which

extradition is sought, the executive authority of the requested State, after consulting with the executive authority of the requesting State, shall decide whether to extradite the person or to submit the case to its competent authorities for the purpose of prosecution. In making its decision, the requested State shall consider all relevant factors, including but not limited to:

"(i) the place where the act was committed or intended to be committed or the injury occurred or was intended to occur;

"(ii) the respective interests of the Contracting Parties;

"(iii) the nationality of the victim or the intended victim; and

"(iv) the availability and location of the evidence."

ARTICLE VIII

Notwithstanding paragraph (2) of Article 18 of the Extradition Treaty, this Protocol shall apply in all cases where the request for extradition is made after its entry into force regardless of whether the offense was committed before or after that date.

ARTICLE IX

(1) This Protocol shall be subject to ratification in accordance with the applicable procedures of the Government of the United States and the Government

of Canada and instruments of ratification shall be exchanged as soon as possible.

(2) The Protocol shall enter into force upon the exchange of instruments of ratification.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Protocol.

DONE in duplicate at Ottawa, this 11th day of January 1988, in the English and French languages, the two texts being equally authentic.

For the Government of the United States of America.

GEORGE P. SHULTZ.

For the Government of Canada.

JOE CLARK.

SECOND PROTOCOL AMENDING THE TREATY ON EXTRADITION BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF CANADA

Signed at Washington on December 3, 1971, as amended by an Exchange of Notes at Washington on June 28 and July 9, 1974, and by a Protocol signed at Ottawa on January 11, 1988

THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF CANADA (hereinafter "the Parties");

RECOGNIZING the close bilateral relationship which exists between them, reflected in numerous instruments and mechanisms of legal cooperation;

COMMITTED to strengthening legal cooperation in the fight against crime; and

DESIRING to make more effective the Extradition Treaty between the Parties, signed at Washington on December 3, 1971 (hereinafter "the Extradition Treaty"), as amended by an exchange of notes of June 28 and July 9, 1974, and the Protocol to the Extradition Treaty between the Parties, signed at Ottawa on January 11, 1988 (hereinafter "the Protocol");

HAVE AGREED as follows:

ARTICLE 1

The Extradition Treaty is amended by adding the following after Article 7:

"Article 7 bis

1. The requested State, after granting an extradition request made, in accordance with the Extradition Treaty, may temporarily surrender a person who has been convicted and sentenced in the requested State, in order that the person sought may be prosecuted in the requesting State. The temporary surrender of the person shall not divest the Courts in the requested State of jurisdiction over any appeal or habeas corpus application relating to the conviction or sentence that otherwise may be available under the laws of the requested State.

2. A person temporarily surrendered pursuant to paragraph 1 shall be kept in custody in the requesting State. The person shall be returned to the requested State within forty-five (45) days after the conclusion of the proceedings for which the person's presence was required in the requesting State or at another time as specified by the requested State, in accordance with conditions to be determined by the Parties for that purpose. The return of the person to the requested State shall not divest the Courts in the requesting State of jurisdiction over any appeal or

habeas corpus application that otherwise may be available under the laws of that State, in relation to the matter for which the person was temporarily surrendered.

3. The period of time spent in custody in the requesting State may be credited to the sentence in the requested State.

4. When the sentence that the person was serving in the requested State expires during the temporary surrender, the requested State may waive the return of the person and the surrender will be considered to be a final surrender. A "final surrender" is a surrender of a person pursuant to this Treaty other than as provided for by this Article.

5. Subject to paragraph 7, if a person temporarily surrendered and returned to the requested State has been sentenced to imprisonment in the requesting State for the offence for which the person was temporarily surrendered, the person shall be finally surrendered to the requesting State, in accordance with paragraph 6, without a further request for extradition.

6. Final surrender shall take place when the person has finished serving the custodial portion of the sentence in the requested State, or at an earlier time specified by the requested State.

7. Final surrender shall not take place when:

(a) the requesting State advises that final surrender is no longer required due to the

expiration of the sentence imposed or for other reasons; or

(b) after the temporary surrender, the warrant or order for the final surrender of a person sought is revoked by the competent authority of the requested State."

ARTICLE 2

Article 10(2) of the Extradition Treaty is deleted and replaced by the following text:

"(2) The documentary evidence in support of a request for extradition or copies of these documents shall be admitted in evidence in the examination of the request for extradition when:

(a) in the case of a request emanating from Canada, they are authenticated by an officer of the department of Justice of Canada and are certified by the principal diplomatic or consular officer of the United States in Canada;

(b) in the case of a request emanating from the United States for a person who is sought for prosecution, they are certified by a judicial authority or prosecutor who attests that the evidence is available for trial and is sufficient to justify prosecution under the law of the prosecuting jurisdiction. In the case of a request emanating from the United States for a person who is sought in connection with a conviction, the documents must be certified by a judicial, prosecuting or correctional

authority who attests to the fact that the documents are accurate; or

(c) they are certified or authenticated in any other manner accepted by the law of the requested State."

ARTICLE 3

1. This Second Protocol shall form an integral part of the Extradition Treaty.

2. Notwithstanding paragraph (2) of Article 18 of the Extradition Treaty, this Second Protocol shall apply in all cases where the request for extradition is made after its entry into force regardless of whether the offence was committed before or after that date.

3. This Second Protocol shall be subject to ratification, and shall enter into force upon the exchange of instruments of ratification. It shall terminate upon termination of the Extradition Treaty.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Second Protocol.

DONE in duplicate at Ottawa this Twelfth day of January 2001 In the English and French languages, the two texts being equally authentic.

/s/ Gordon D. Griffin
FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

/s/ George Haynal
FOR THE GOVERNMENT OF CANADA

(2)

No. 08-1321

FILED
JUN 2 9 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

STATE OF NEW YORK,

Petitioner,

v.

ANTHONY ROMEO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION

BARRY A. BOHRER
Counsel of Record
BARBARA L. TRENCHER
MORVILLO, ABRAMOWITZ, GRAND, IASON, ANELLO & BOHRER, P.C.
565 Fifth Avenue
New York, NY 10017
(212) 856-9600

Attorneys for Respondent

223622

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether a nineteen-year post-indictment delay in prosecution violates a defendant's constitutional right to a speedy trial where the prosecutor initially elects to defer prosecution until completion of foreign judicial proceedings, and then fails even to make an extradition request despite being aware of the defendant's incarceration in a foreign jurisdiction that is party to an extradition treaty permitting his extradition to the United States.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Opinions Below	1
Jurisdiction	1
Statement	1
Reasons for Denying the Petition	7
Conclusion	24

TABLE OF CITED AUTHORITIES

Page

Cases:

Barker v. Wingo,
407 U.S. 514 (1972) ..... *passim*

Doggett v. United States,
505 U.S. 647 (1992) 18, 19

Moore v. Arizona,
414 U.S. 25 (1973) 18, 20

Smith v. Hooey,
393 U.S. 374 (1969) ..... *passim*

Smith v. Meese,
821 F.2d 1484 (11th Cir. 1987) 22

United States v. Blanco,
861 F.2d 773 (2d Cir. 1988) 14

United States v. McConahy,
505 F.2d 770 (7th Cir. 1974) 10, 12, 14, 15

United States v. McDonald,
172 F. Supp. 2d 941 (W.D. Mich. 2001) 10, 15

United States v. Pomeroy,
822 F.2d 718 (8th Cir. 1987) 10, 11, 12, 15

United States v. Rowbotham,
430 F. Supp. 1254 (D. Mass. 1977) 15

Cited Authorities

Page

United States v. Sandoval,
990 F.2d 481 (9th Cir. 1993) 16

United States v. Walton,
814 F.2d 376 (7th Cir. 1987) 14

Statutes:

Extradition Act, Can. Rev. Stat. Ch. 322,
Part I, § 3 (1985) 11

28 U.S.C. § 1257 1

Miscellaneous:

Paul Michell, *Domestic Rights and International Responsibilities: Extradition Under the Canadian Charter*, 23 Yale J. Int'l L. 141 (1998) 11-12

Sharon Williams, *The Double Criminality Rule and Extradition: A Comparative Analysis*, 15 Nova L. Rev. 581 (1991) 12

OPINIONS BELOW

The opinion of the State of New York Court of Appeals (Pet. App. 1a-11a) is reported at 12 N.Y.3d 51 (2009). The opinion of the New York Supreme Court, Appellate Division, Second Department (Pet. App. 12a-18a) is reported at 47 A.D.3d 954, 849 N.Y.S.2s 666 (2d Dep't 2008). The memorandum decision and order of the County Court of Suffolk County, dated December 4, 1999 (Pet. App. 19a-23a), is not reported.

JURISDICTION

The judgment of the State of New York Court of Appeals was entered on February 11, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATEMENT

In March 1987, Anthony Romeo was indicted for murder in the second degree by a Suffolk County, New York grand jury. Although Mr. Romeo repeatedly demanded a speedy trial, the Suffolk County District Attorney's Office elected to have Mr. Romeo extradited to and tried in Canada on unrelated charges—even though the Suffolk County charges related to an incident that predated the subject of the Canadian charges. Mr. Romeo was subsequently convicted and incarcerated in Canada. In 1999, while still imprisoned in Canada, Mr. Romeo moved to dismiss the Suffolk County indictment on constitutional and statutory speedy trial grounds. IIis motion was denied, and he was not arraigned on the Suffolk County charges until November 2005,

nineteen years after his indictment. In February 2006, Mr. Romeo entered a plea of guilty to manslaughter in the first degree. He was sentenced to a term of imprisonment of seven to twenty-one years.

The New York Supreme Court, Appellate Division, Second Department reversed the conviction and dismissed the indictment, holding that Petitioner's delay in prosecuting Mr. Romeo had violated his right to a speedy trial. The State of New York Court of Appeals affirmed.

1. In November 1985, Suffolk County police discovered the body of John Starkey, who had been fatally shot. Approximately one year later, in January 1987, the Suffolk County District Attorney's Office obtained a court order authorizing hair and blood samples to be taken from Mr. Romeo for comparison with physical evidence recovered by the police. Mr. Romeo left the country for Canada before the samples could be obtained.

Shortly thereafter, on March 8, 1987, Mr. Romeo returned to the United States and was arrested in Boston, Massachusetts, where he was held on charges that he had fatally shot a Canadian highway patrol officer in New Brunswick, Canada. The Canadian government formally requested that he be brought to Canada to stand trial on those charges. As a result, a federal district court in Boston ordered that Mr. Romeo be held without bail pending an extradition hearing.

On March 27, 1987, while Mr. Romeo was still in United States custody in Boston, a Suffolk County grand

jury returned an indictment against Mr. Romeo in connection with the November 1985 murder of John Starkey. On April 1, 1987, just five days after the indictment was returned, while Mr. Romeo was still in United States custody, Mr. Romeo's counsel wrote to the Suffolk County District Attorney's Office and unequivocally asserted Mr. Romeo's right to a speedy trial. On the same day, Mr. Romeo's counsel sent a separate letter to the attorney at the United States Department of Justice responsible for the extradition proceedings in Boston, with a copy to the Suffolk County District Attorney's Office, reiterating Mr. Romeo's request for a speedy trial.

On March 31, 1987 and April 28, 1987, the district court held extradition hearings in Boston and ordered that Mr. Romeo be extradited to Canada. However, in response to the letter of Mr. Romeo's counsel dated April 1, 1987, the United States Department of Justice advised Mr. Romeo's counsel that the United States could defer Mr. Romeo's extradition to Canada because of the indictment pending in Suffolk County. Thus, if the Suffolk County District Attorney's Office had wanted to prosecute Mr. Romeo before he was extradited to Canada, it could have done so. Yet, even though Mr. Romeo remained in United States custody while he appealed the extradition order, the Suffolk County District Attorney's Office declined to prosecute him, electing instead to defer its prosecution until completion of the Canadian proceedings.

During the pendency of his appeal of the extradition order and in furtherance of his efforts to secure a speedy trial, Mr. Romeo sought to compel Petitioner to proceed

with his arraignment and trial. On May 29, 1987, he moved for an order, pursuant to a provision of New York's Criminal Procedure Law, directing the Suffolk County District Attorney to apply for a writ of *habeas corpus ad prosequendum* to produce the defendant forthwith for arraignment on the indictment. During the hearing on Mr. Romeo's motion, held on June 15, 1987, Mr. Romeo reiterated his demand for an arraignment and speedy trial. The District Attorney resisted Mr. Romeo's efforts to be returned to New York from Boston to face the Suffolk County charges, arguing that the court could not compel the District Attorney to produce the defendant in New York. The Assistant District Attorney advised the court that the District Attorney's Office was electing to defer its prosecution of Mr. Romeo until after Canadian authorities had completed their prosecution of Mr. Romeo, and argued that Mr. Romeo would suffer no delay as a result of the decision to defer the Suffolk County arraignment and trial in favor of the Canadian prosecution.

The court denied Mr. Romeo's May 1987 application for an order directing Petitioner to produce the defendant for arraignment in Suffolk County, concluding that the court could not compel the District Attorney to produce an out-of-state defendant for prosecution. In so doing, the court cautioned the District Attorney's Office both orally and in a written decision that the District Attorney would have to accept the potential ramifications of any decision to defer its prosecution of Mr. Romeo, and that the decision to defer the prosecution could result in a violation of Mr. Romeo's right to a speedy trial. Pet.App. 7a. Thereafter, Mr. Romeo was extradited to Canada.

2. Mr. Romeo was convicted on the Canadian charges in 1987 and sentenced to a term of imprisonment of twenty-five years to life, with eligibility for parole in 2012. On July 23, 1999, while still incarcerated in Canada and more than twelve years after the District Attorney's Office advised the court that Mr. Romeo would suffer no delay by facing the Canadian charges first, Mr. Romeo moved to dismiss the Suffolk County indictment on speedy trial grounds. He still had not even been arraigned on the Suffolk County charges. Moreover, although the Assistant District Attorney had assured the court in 1987, while Mr. Romeo was still in United States custody, that the District Attorney's Office would take all steps necessary to have the defendant returned to the United States following his prosecution in Canada, Petitioner had failed even to request his extradition. In opposition to Mr. Romeo's motion to dismiss, Petitioner argued that even though it never made an extradition request, its failure to do so should be excused because such a request would have been futile. In a brief memorandum opinion, the County Court, Suffolk County, adopted Petitioner's argument and denied Mr. Romeo's motion. Pet.App. 19a-23a.

3. In November 2005, after Canadian authorities temporarily surrendered Mr. Romeo to the United States, Mr. Romeo was arraigned on the Suffolk County charges. On February 2, 2006, as part of a plea agreement, Mr. Romeo entered a plea of guilty to manslaughter in the first degree, and on February 16, 2006, the County Court, Suffolk County, imposed a term of imprisonment of seven to twenty-one years to run concurrently with the Canadian sentence.

4. The New York Supreme Court, Appellate Division, Second Department reversed the conviction and dismissed the indictment, holding that Petitioner's delay in prosecuting Mr. Romeo had violated his right to a speedy trial. Specifically, the court held that Petitioner's decision to defer prosecuting Mr. Romeo in favor of the Canadian prosecution, and its subsequent failure to make an extradition request to Canada, caused the "extraordinary delay" that violated Mr. Romeo's constitutional right to a speedy trial. Pet.App. 17a-18a.

The State of New York Court of Appeals affirmed. In so doing, the court concluded, "The genesis of this extraordinary delay was the People's decision to defer the prosecution, allowing the defendant to be sent abroad for a foreign murder prosecution, and then failing to make an extradition request to Canadian authorities, which, if granted, might have mitigated the length of the delay." Pet.App. 6a. The court further found that at the time Petitioner elected to defer its prosecution, it "knew or should have known that there was no guarantee that [Mr. Romeo] would be brought back to Suffolk County in a timely manner," *id.* at 7a, and emphasized that Petitioner had an obligation to "make diligent, good faith efforts to secure [Mr. Romeo's] presence in the state for arraignment and trial." The court specifically rejected Petitioner's contention that a formal extradition request to Canada would have been futile: Petitioner was

> advised that the extradition treaty in effect would have enabled the People to request [Mr. Romeo]'s extradition, which the Canadian authorities had the discretion to grant or

> defer until the completion of [Mr. Romeo]'s sentence. . . . [N]othing in th[e] record demonstrates that a[n] [extradition] request [to the Canadian government] would have been futile.

Id. at 7a-8a.

REASONS FOR DENYING THE PETITION

Petitioner seeks review of the holding of the State of New York Court of Appeals, which held that Petitioner's decision to defer prosecution of Mr. Romeo in order to allow him to be tried in Canada first, its subsequent failure to seek Mr. Romeo's extradition from Canada, and the prejudice caused by the post-indictment delay, violated Mr. Romeo's constitutional right to a speedy trial. That holding is correct, does not raise an unresolved question of federal law that should be settled by this Court, and does not conflict with any other decision of this Court, any United States Court of Appeals, or any state court of last resort. Further review of Petitioner's claim is therefore unwarranted.

1. Petitioner contends (Pet. 15-20) that Mr. Romeo's constitutional right to a speedy trial was not violated because Mr. Romeo was partially responsible for the delay in his arraignment and prosecution. Specifically, Petitioner argues that Mr. Romeo, rather than Petitioner, caused the delay because "the Canadian murder was the genesis for all of the delay in prosecuting the New York murder," Pet. at 17. According to Petitioner, the State of New York Court of Appeals failed to give proper weight to Mr. Romeo's "proportionate responsibility." *Id.* at 15.

The Court of Appeals properly concluded that the delay suffered by Mr. Romeo was caused by Petitioner, not by Mr. Romeo. Pet.App. at 6a. In reaching this conclusion, the Court correctly emphasized that even before Mr. Romeo was extradited to Canada, Petitioner

> had been placed on notice that their decision [to defer his prosecution] might violate [Mr. Romeo]'s constitutional speedy trial rights, as [Mr. Romeo] was already making claims that he was being prejudiced by the delay. In the face of these warnings, [Petitioner] still allowed [Mr. Romeo] to be prosecuted abroad before even arraigning him on the Suffolk County charges.

Id. at 7a. The Court of Appeals further considered the fact that, "even if acting under the mistaken belief that [Mr. Romeo]'s presence could be obtained in Suffolk County promptly after the Canadian trial, [Petitioner] knew or should have known that there was no guarantee that defendant would be brought back to Suffolk County in a timely manner." *Id.* Finally, the Court of Appeals properly concluded that under the terms of the Treaty between the United States and Canada, Petitioner could have requested Mr. Romeo's extradition following the Canadian trial, "which the Canadian authorities *had the discretion to grant or defer* until the completion of [Mr. Romeo]'s sentence." *Id.* (emphasis added). As such, the Court of Appeals correctly held that in order to avoid violating Mr. Romeo's constitutional right to a speedy trial, Petitioner was obligated to, "at the very minimum," *id.*, make a formal extradition request for Mr. Romeo's return.

a. Petitioner has a "constitutional duty to make a diligent, good faith effort" to bring a defendant to trial in a timely manner. *Smith v. Hooey*, 393 U.S. 374, 383 (1969). Here, Petitioner failed to satisfy that duty—initially, by electing to defer its prosecution of Mr. Romeo until after the Canadian proceedings and, then, by failing to make an extradition request while Mr. Romeo was incarcerated in Canada.

In 1987, while Mr. Romeo was in United States custody, Petitioner chose to defer its prosecution of Mr. Romeo. Petitioner made that choice despite an explicit warning from the court, both orally and in writing, that Petitioner's decision might impact Mr. Romeo's right to a speedy trial. Whether motivated by bad faith or sheer negligence, any delay resulting from Petitioner's decision to forego prosecution of Mr. Romeo when it clearly had the opportunity to do so must be attributed to Petitioner, not to Mr. Romeo. *See Barker v. Wingo*, 407 U.S. 514, 531 (1972) (the "ultimate responsibility," even for delay resulting from "negligence," "must rest with the government rather than with the defendant").

There is no question that Petitioner could have prosecuted Mr. Romeo on the Suffolk County charges before he was returned to Canada, if it had wanted to do so. Indeed, Petitioner does not argue otherwise. In fact, in opposing Mr. Romeo's May 1987 motion to compel the District Attorney to produce the defendant forthwith for arraignment on the indictment, the Assistant District Attorney advised the court that the District Attorney's Office had elected to defer Mr. Romeo's prosecution until after Canadian authorities could proceed on the Canadian charges, and assured

the court that Mr. Romeo would not suffer any additional delay in his prosecution on the Suffolk County charges as a result of being tried in Canada first.

Even assuming that Petitioner truly believed, in May 1987, that it could promptly secure Mr. Romeo's return to the United States when it chose to defer its prosecution of him, but subsequently learned otherwise, Petitioner is still responsible for the delay. Petitioner has an obligation not only to act in good faith, but to exercise diligence in ensuring that the defendant receives a speedy trial. *See Hooey*, 393 U.S. at 383; *see also Barker*, 407 U.S. at 527. Thus, it was incumbent upon Petitioner to ascertain fully and accurately the feasibility of securing Mr. Romeo's return before it made the choice to forego his prosecution. Any delay resulting from Petitioner's negligence in doing so must be attributed to Petitioner, not to Mr. Romeo. *See Barker*, 407 U.S. at 527, 531 (holding that the State, not the defendant, has the duty of ensuring a speedy trial).

b. Even after Mr. Romeo was extradited to and incarcerated in Canada, Petitioner failed to secure his return for nearly nineteen years. The law is clear that a defendant's incarceration in another jurisdiction does not excuse a delay in his prosecution. *See Hooey*, 393 U.S. at 382-83. Thus, where a defendant is incarcerated in a foreign country that is party to an extradition treaty permitting his extradition to the United States, unless the State can demonstrate that a request for his return would be futile, the State must make an effort to secure his presence for trial by seeking his extradition. *See United States v. Pomeroy*, 822 F.2d 718, 721-22 (8th Cir. 1987); *United States v. McConahy*, 505 F.2d 770, 773 (7th Cir. 1974); *United States v. McDonald*, 172 F. Supp. 2d 941, 948-949 (W.D. Mich. 2001).

As Petitioner implicitly acknowledges, the terms of the Extradition Treaty between the United States and Canada gave Canadian authorities the discretion to grant or defer an extradition request for an individual incarcerated in Canada. The Treaty provides that:

> When the person whose extradition is requested is being proceeded against or is serving a sentence in the territory of the requested State for an offense other than that for which extradition has been requested, his surrender *may* be deferred until the conclusion of the proceedings and the full execution of any punishment he may be or may have been awarded.[1]

Pet.App. at 30a-31a (emphasis added). *See also Pomeroy*, 822 F.2d at 721.

---

1. Although the Canadian Extradition Act, prior to its 1999 amendment, provided that an individual serving a sentence in Canada "shall not be surrendered until after he has been discharged," this provision of the Act did not change Canada's authority under the Extradition Treaty to surrender an individual incarcerated in Canada. This provision of the Extradition Act did not affect the discretion granted by the Extradition Treaty because Section 3 of the Extradition Act states that "no provision of this Part that is inconsistent with any of the terms of the [extradition treaty] has effect to contravene the [treaty] . . . ." Extradition Act, Can. Rev. Stat. Ch. 322, Part I, § 3 (1985). Under Canadian law—namely, Section 3 of the Extradition Act—it is clear that where a conflict exists between an extradition treaty and the Canadian Extradition Act, the treaty prevails. *See Pomeroy*, 822 F.2d at 721; Paul Michell, *Domestic Rights and International Responsibilities:* (Cont'd)

Because the Extradition Treaty permitted Mr. Romeo's extradition to the United States, Petitioner was obligated to request his extradition unless such a request would have been futile. *See McConahy*, 505 F.2d at 773; *Pomeroy*, 822 F.2d at 721. The burden rests on Petitioner to demonstrate that an extradition request would have been futile. *See McConahy*, 505 F.2d at 773; *see also Pomeroy*, 822 F.2d at 721-722. Petitioner has not satisfied, and cannot satisfy, this burden.

The correspondence received by the District Attorney's Office from Canadian authorities and the United States Department of Justice belies any claim of futility. In a May 1987 letter from the Canadian Department of Justice, the General Counsel of the Criminal Prosecutions Section stated that a formal extradition request required the initiative of the District Attorney's Office and explained that, if an extradition request were made, the Canadian Minister of Justice would then have the discretion under the Extradition Treaty to extradite Mr. Romeo before his Canadian sentence was completed. The General Counsel advised that Canadian authorities have exercised such discretion

---

(Cont'd)

Extradition Under the Canadian Charter, 23 Yale J. Int'l L. 141, 165 (1998) (noting that the Extradition Act "clearly states" that an extradition treaty trumps any inconsistent provisions of the Extradition Act); Sharon Williams, *The Double Criminality Rule and Extradition: A Comparative Analysis*, 15 Nova L. Rev. 581, 583 (1991) (noting that an extradition treaty prevails over inconsistent provisions of the Extradition Act). The District Attorney's Office was expressly advised by Canadian officials in 1987 that Section 3 of the Extradition Act made the Treaty the prevailing law.

in some cases. Thus, the letter made clear to the District Attorney's Office that extradition of Mr. Romeo was a viable option and, in fact, would not have been unprecedented. Pet.App. at 3a.

Further contravening any claim of futility, the General Counsel expressly indicated a potential willingness on behalf of the Minister of Justice to extradite Mr. Romeo. In fact, the General Counsel advised that the fact that New York State and United States officials had assisted Canada in bringing Mr. Romeo to trial in Canada would weigh in *favor* of Canada agreeing to extradite Mr. Romeo to New York. Thus, although extradition was not a foregone conclusion, there can be no dispute that it was a viable possibility, particularly if the Suffolk County authorities had expressed a desire for Mr. Romeo's return.

Moreover, in March 1989, Petitioner received a letter from the Department of Justice that reiterated that extradition remained a potentially viable means of securing Mr. Romeo's presence in New York for trial. The letter identified three means of obtaining Mr. Romeo's presence for arraignment and trial in Suffolk County. One of these means was a straightforward extradition request to be made by Suffolk County through the United States government. The letter noted that if Suffolk County requested Mr. Romeo's extradition, Canada could extradite him even before completion of his sentence, but speculated that commutation of his Canadian sentence was "not very likely" given the nature of the Canadian offense. Nothing in the record indicates that this conjecture by the DOJ attorney was based on any communications with

Canadian authorities, who previously had indicated a willingness, on more than one occasion, to release Mr. Romeo prior to completion of his Canadian sentence.

Thus, this case stands in marked contrast to *United States v. Walton*, 814 F.2d 376 (7th Cir. 1987), where the court found that a formal extradition request would have been futile. In *Walton*, the government approached Swedish officials on multiple occasions and was told unambiguously, *by Swedish officials*, that Sweden would not release Walton. Additionally, according to a contemporaneous memo from the Department of State, Swedish officials "*unequivocally* stated that Sweden is not interested in sending Mr. Walton to the United States until he has completed his full term." *Id.* at appx. 1 (emphasis added); *see also United States v. Blanco*, 861 F.2d 773, 778 (2d Cir. 1988) (holding that a request for extradition of Colombian national would have been futile where Colombia refused to extradite its nationals and the President of Colombia made clear that he would not enforce extradition treaty).

Nothing in the record suggests that Canada expressed such a sentiment in this case, or that Petitioner's supposed belief that extradition was unlikely was based on anything other than rank speculation. Indeed, the communications from the relevant Canadian authorities indicated that extradition requests had been granted in analogous situations and that the Minister might be willing to do so in Mr. Romeo's case as well. Because the record makes clear that "it might have been possible" to secure Mr. Romeo's presence in New York, *McConahy*, 505 F.2d at 773, Petitioner had a constitutional obligation to at least *request* Mr. Romeo's

extradition. *See id.* (because there was a possibility that England would have returned the defendant to the United States before the completion of his British sentence, government violated right to speedy trial by failing to seek his return); *Hooey*, 393 U.S. at 382 ("The possibility of a refusal is not the equivalent of asking and receiving a rebuff." (quotation marks omitted)); *Pomeroy*, 822 F.2d at 721-722 (fact that Canada had discretion to defer extradition until after defendant served sentence in Canada did not excuse government's failure to make formal extradition request); *McDonald*, 172 F. Supp. 2d at 948-949 (fact that Bahamian government might have elected to defer extradition until after resolution of local charges did not justify failure to request extradition); *United States v. Rowbotham*, 430 F. Supp. 1254, 1257 (D. Mass. 1977) ("That Canada may not honor an extradition request is no excuse for failing to make one.").

2. Petitioner further contends (Pet. at 24) that Mr. Romeo is responsible for the delay in his arraignment and prosecution because he "never requested a transfer to serve his Canadian sentence in the United States." *Id.* at 24. Both the New York Supreme Court, Appellate Division, Second Department, and the State of New York Court of Appeals properly rejected this argument.

First, if Mr. Romeo had requested a transfer under the Exchange of Prisoners Treaty, that request would have been subject to approval by Canada and the United States authorities. To be sure, a request for Mr. Romeo's return to the United States would have been more likely to succeed if made by Petitioner than by Mr. Romeo himself.

Second, even aside from the inefficacy of such an approach, Petitioner cannot excuse its own failure to exercise diligence by improperly shifting its burden onto the defendant. Although a defendant cannot take affirmative action to hinder a speedy trial, such as evading arrest or contesting his extradition, *United States v. Sandoval*, 990 F.2d 481, 485 (9th Cir. 1993), the constitution does not require him to take affirmative action to facilitate his return. In fact, a "defendant has no duty to bring himself to trial; the State has that duty . . . ." *Barker*, 407 U.S. at 527. Petitioner cannot fail to seek extradition for nearly twenty years and then claim that its inaction is justified simply because Mr. Romeo might have been able to effectuate his own return.

3. Petitioner also contends (Pet. at 24) that Mr. Romeo's constitutional right to a speedy trial was not violated because Mr. Romeo's right to a speedy trial was not "aggressively asserted." *Id.* at 24. The State of New York Court of Appeals correctly rejected Petitioner's argument, which is contrary to the factual record.

Although a defendant does not waive his right to a speedy trial by failing to make a demand, one of the factors to be weighed in evaluating a speedy trial claim is whether the defendant has asserted his right to a speedy trial. *See Barker*, 407 U.S. at 528. As the State of New York Court of Appeals correctly noted, beginning in 1987, Mr. Romeo "made a series of formal demands to [Petitioner] for an immediate arraignment and trial on the Suffolk County indictment. He made a similar demand to the United States Department of Justice, asserting his constitutional right to a speedy trial." Pet.App. at 2a. Moreover, while in U.S. custody, Mr.

Romeo filed a motion seeking to *compel* the Suffolk County District Attorney to produce him for arraignment and trial. And in 1999, Mr. Romeo again asserted his right to a speedy trial by moving to dismiss the indictment on speedy trial grounds. Thus, Mr. Romeo clearly, unequivocally and aggressively asserted his right to a speedy trial.

Indeed, Petitioner does not dispute this factual record. Instead, Petitioner argues that after being extradited to Canada, and tried and imprisoned in Canada, Mr. Romeo waited 12 years to

> ma[k]e the single motion to dismiss. While serving his Canadian sentence, respondent never requested a transfer to serve his Canadian sentence in the United States. These actions were not consistent with that of a person who truly wanted a speedy trial in New York. . . . [Mr. Romeo]'s posture as an aggrieved defendant who wanted his day in court remains inauthentic and contrived to this day.

Pet. at 24. Essentially, Petitioner argues that despite the factual record clearly demonstrating that Mr. Romeo repeatedly asserted his right to a speedy trial, and demanded that he be arraigned and brought to trial in New York, Mr. Romeo did not actually *want* a speedy trial. Petitioner does not cite a single case in support of this argument, which was correctly rejected by the State of New York Court of Appeals.

Mr. Romeo clearly asserted his right to a speedy trial. As discussed above, after asserting his right to a speedy trial, Mr. Romeo was not required to take steps to serve his Canadian sentence in the United States. Nor was he required to make a motion to dismiss the indictment on speedy trial grounds repeatedly, or within a shorter time frame than 12 years. Indeed, nothing more was required of him. Petitioner cannot escape the factual record, and overcome its own failure to accord Mr. Romeo his constitutional right, by arguing that despite Mr. Romeo's demands for a speedy trial, Mr. Romeo did not actually *want* a speedy trial.

4. Petitioner also contends (Pet. at 34) that the extraordinary delay experienced by Mr. Romeo was not an impairment to his defense of the charges in the indictment. This argument was correctly rejected by the State of New York Court of Appeals, which specifically concluded that "it is highly likely that [Mr. Romeo's] defense was 'impaired' by [his] incarceration for many years in a foreign prison where it would have been difficult for him to participate in his own defense, confer with counsel and contact witnesses." Pet.App. at 10a (quoting *Hooey*, 393 U.S. at 374).

A lengthy delay is presumptively prejudicial even in the absence of proof of actual prejudice. *Doggett v. United States*, 505 U.S. 647 (1992). Thus, an affirmative demonstration of prejudice is not necessary to establish a violation of a defendant's constitutional right to a speedy trial. *Moore v. Arizona*, 414 U.S. 25, 26 (1973); *Doggett*, 505 U.S. at 655. This Court has explained that a lengthy delay is not "tolerable simply because the accused cannot demonstrate exactly how it has

prejudiced him." *Doggett*, 505 U.S. at 657. An excessive delay is presumptively prejudicial because with the passage of time, neither party can be expected to prove the presence or absence of prejudice. *Id.* at 655; *see also Barker*, 407 U.S. at 532 (noting that a defendant may not be able to demonstrate the prejudice suffered as a result of delay because "what has been forgotten can rarely be shown"). The importance of such presumptive prejudice increases with the length of the delay. *Doggett*, 505 U.S. at 656. The 19-year delay in this case is sufficiently extraordinary that it gives rise to a presumption of prejudice.

Moreover, Mr. Romeo has suffered actual prejudice as a result of Petitioner's delay. As this Court has noted, "it is self-evident that the possibilities that long delay will impair the ability of an accused to defend himself are markedly increased when the accused is incarcerated in another jurisdiction." *Hooey*, 393 U.S. at 379-380 (quotation marks omitted). The impairment to the defense is particularly acute here because the delay not only diminished, but effectively eliminated, Mr. Romeo's ability to establish a defense based on a lack of criminal responsibility by reason of mental disease or defect. The record shows that Mr. Romeo was suffering severe psychiatric problems at least as early as 1987. Indeed, at the time of the extradition proceedings in Boston, the federal district court granted his application to be transferred to a prison with more suitable psychiatric facilities given the problems he was experiencing. Because such a defense would have required Mr. Romeo to establish his mental incapacity *at the time of the offense*, the State of New York Court of Appeals correctly concluded that his ability to do so

was impaired by being arraigned more than twenty years after the underlying event.

Additionally, the prejudice to be considered by the court is not limited to the prejudice to his defense. *See Moore*, 414 U.S. at 26-27. Rather, prejudice should be assessed in light of the various interests that the speedy trial right is intended to protect. *See Barker*, 407 U.S. at 532. This Court has identified three such interests: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Id.* The impairment of these interests is "both aggravated and compounded in the case of an accused who is imprisoned by another jurisdiction." *Hooey*, 393 U.S. at 378.

The delay in bringing to trial someone who is already incarcerated for another offense "may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge." *Hooey*, 393 U.S. at 378. For example, where the defendant is incarcerated for another offense, the delay in prosecution may ultimately increase the period of incarceration by foreclosing the possibility of at least some of the sentence being served concurrently. *Hooey*, 393 U.S. at 378. Mr. Romeo unquestionably has suffered such prejudice. If Mr. Romeo had been arraigned and tried earlier, as he demanded, he could have received credit for time served in Canadian custody. Indeed, the sentence imposed by the court below—which was not imposed until 2006 due to Petitioner's delay—is to run concurrently with the Canadian sentence, but only as of February 2006. Thus, Mr. Romeo will receive no credit for the previous nineteen years spent in custody.

In addition, this Court has expressed concern that where the defendant is incarcerated on other charges, "the duration of [the defendant's] present imprisonment may be increased, and the conditions under which he must serve his sentence greatly worsened, by the pendency of another criminal charge outstanding against him." *Hooey*, 393 U.S. at 378. That concern has also materialized in this case: Mr. Romeo's request for a work clearance, for example, was denied, and that result was influenced by the then-pending and unresolved Suffolk County indictment.

Finally, the "anxiety and concern accompanying public accusation" is no less severe merely because the defendant is incarcerated for a separate offense. *Hooey*, 393 U.S. at 379 (quotation marks omitted). Indeed, the Court has recognized that the anxiety and concern that stems from being charged with a crime can have just "as depressive an effect upon a prisoner as upon a person who is at large." *Id.* Mr. Romeo experienced this anxiety and concern relating to the Suffolk County charges for nearly two decades, during which Petitioner took no steps to have him arraigned and tried in New York.

5. Finally, Petitioner contends (Pet. at 26-28, 35-36) that the decision of the State of New York Court of Appeals upsets the balance of power by interfering with the executive branch's decisions and actions with respect to extraditions and treaties. According to Petitioner, "Treaties protect the United States' right to prosecute its cases before sending fugitives to foreign nations but there should be no requirement to do so in every case," *id.* at 27, and dismissal of the indictment on speedy trial grounds undermined the "discretionary

executive authority to decide who should be first to prosecute a multi-jurisdictional offender," *id.* at 36. This argument was properly rejected by the State of New York Court of Appeals.

As an initial matter, Petitioner's discretionary authority cannot trump Mr. Romeo's constitutionally guaranteed right to a speedy trial. "While the executive has discretion over prosecutorial decisions, it has no discretion to violate the constitutional rights of individuals. . . . [Petitioner] cannot cloak constitutional violations under the guise of prosecutorial discretion and expect the federal courts simply to look the other way." *Smith v. Meese*, 821 F.2d 1484, 1492 (11th Cir. 1987).

Moreover, The State of New York Court of Appeals did not hold that Suffolk County was *required* to arraign and try Mr. Romeo before consenting to his extradition to Canada, or that the United States did not have discretionary authority to extradite Mr. Romeo to Canada before he had been tried in New York. Instead, the State of New York Court of Appeals simply and properly held that, "[I]t was [Petitioner]'s burden to bring the defendant to trial in a timely fashion," Pet.App. at 6a (citing *Hooey*, 393 U.S. at 383), and Petitioner failed to satisfy that burden.

Mr. Romeo repeatedly demanded a speedy trial. This demand was made to both the Suffolk County District Attorney's Office, and the United States Department of Justice. In response to the demand, the United States Department of Justice advised Mr. Romeo's counsel that

the United States could defer Mr. Romeo's extradition because of the indictment pending in Suffolk County. Additionally, the Suffolk County Court warned the District Attorney's Office, both orally and in writing, that Petitioner's decision to defer prosecution of Mr. Romeo could implicate his right to a speedy trial. Nonetheless, and in the face of these warnings, the District Attorney's Office elected to defer its prosecution in favor of the Canadian prosecution. After Mr. Romeo had been extradited to Canada, Petitioner waited nearly twenty years to pursue a formal request for extradition so that Mr. Romeo could be arraigned and tried in New York.

Petitioner had discretion to defer Mr. Romeo's prosecution, and the United States certainly had the authority to extradite Mr. Romeo to Canada before he was arraigned and tried in New York. But as the Suffolk County Court plainly stated in 1987, Petitioner's discretionary decision was "one that they will have to live with." Pet.App. at 14a. "By deferring prosecution and choosing not to attempt to extradite [Mr. Romeo], [Petitioner] ran the risk of a speedy trial violation." *Id.* at 8a.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

BARRY A. BOHRER
Counsel of Record
BARBARA L. TRENCHER
MORVILLO, ABRAMOWITZ, GRAND,
IASON, ANELLO & BOHRER, P.C.
565 Fifth Avenue
New York, NY 10017
(212) 856-9600

Attorneys for Respondent